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No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM HARRIS SHARPE AND DONALD DAVIS SAVAGE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether law enforcement officers may temporarily detain an individual reasonably suspected of criminal activity for the period—brief, but exceeding a few minutes—reasonably necessary to pursue a circumscribed investigation of the suspected criminal activity.

2. Whether, assuming that the initial phase of either respondent's detention was unduly extended, the illegality mandates suppression of a large shipment of marijuana which, because of its distinct odor, was discovered immediately thereafter in respondent Savage's vehicle.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals subsequent to this Court's remand (App. A, *infra*, 1a-13a) is reported at 712 F.2d 65.[1] The earlier opinion of the court of appeals (App. B, *infra*, 14a-51a) is reported

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[1] This Court's order granting our prior petition for a writ of certiorari, vacating the prior judgments of the court of appeals, and remanding the case to the court of appeals is reported at 457 U.S. 1127.

at 660 F.2d at 967.[2] The district court issued no written opinion.

JURISDICTION

The judgments of the court of appeals (App. C, *infra*, 52a and 53a) on remand from this Court were entered on June 30, 1983. On August 22, 1983, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including September 28, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the District of South Carolina, respondents were convicted of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Respondent Savage was sentenced to eight years' imprisonment, to be followed by a ten-year special parole term. Respondent Sharpe was sentenced to five years' imprisonment to be followed by a ten-year special parole term. A divided panel of the court of appeals reversed respondents' convictions. On our petition for a writ of certiorari (No. 81-1736), the judgment of the court of appeals was vacated and the case remanded for further consideration. 457 U.S. 1127. Upon remand the court of ap-

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[2] As explained below (page 10, *infra*), upon remand from this Court the court of appeals simply deleted certain portions of its original opinion and readopted the balance. It is that disposition that is set forth in the opinion after remand reproduced in App. A, *infra*. For the convenience of the Court, in reproducing the original opinion of the court of appeals in App. B, *infra*, we have placed the passages subsequently deleted in brackets.

peals, again divided, modified its opinion, but once again reversed respondents' convictions.

1. Prior to trial, respondents moved to suppress a large shipment of marijuana found in bales seized from a pickup truck that had been operated by respondent Savage. The evidence at a suppression hearing consolidated with the bench trial showed that, on the morning of June 9, 1978, DEA Agent Luther Cooke was on patrol in an unmarked car on a coastal road in the vicinity of Sunset Beach, North Carolina, an area under surveillance by law enforcement authorities for suspected drug trafficking (I Tr. 35-36). At approximately 6:30 a.m., Agent Cooke noticed a blue pickup truck outfitted with a camper shell travelling in tandem with a blue Pontiac. It was later ascertained that the pickup truck was operated by respondent Savage and that the Pontiac (which also contained a male passenger) was operated by respondent Sharpe. Cooke noticed that the pickup truck was riding low in the rear and appeared overloaded; in addition, the rear window of the camper appeared to be covered with a quilted material (I Tr. 39-41). As he followed the pickup, the agent also observed that when the truck hit a bump or turned a corner it did not bounce or sway, a further indication that it was carrying a heavy load. Cooke drove along behind the two vehicles for approximately 21 miles. When the respondents reached the vicinity of Myrtle Beach, South Carolina, Agent Cooke radioed the State Highway Patrol for assistance (I Tr. 44-46).

Officer Kenneth Thrasher, in a marked patrol car, responded to Cooke's request for assistance. After Thrasher caught up with Cooke, the two officers, in their separate vehicles, followed respondents as the Pontiac and pickup truck turned onto a side road that

ran through a campground and looped back to the highway. Although the speed limit on the road was 35 miles per hour, respondents drove their vehicles at 50 to 60 miles per hour in an apparent attempt to elude the officers (I Tr. 50-52, 142-144; App. B, *infra*, 15a-16a). After completing this fruitless detour the Pontiac and the pickup truck returned to the six-lane highway and continued to proceed in a southerly direction in the center lane. The officers maintained their pursuit. Agent Cooke asked Officer Thrasher to signal both vehicles to stop. Thrasher pulled into the left lane alongside the Pontiac, the lead vehicle, and signaled the driver, respondent Sharpe, to pull over. As Sharpe moved his car into the right lane in compliance with this direction, the pickup truck, driven by respondent Savage, cut between the Pontiac and Thrasher's patrol car, nearly hitting the patrol car, and continued off down the highway (I Tr. 53-54, 144-145).

Officer Thrasher pursued the pickup, while DEA Agent Cooke pulled up behind the Pontiac, which had come to a stop, approached its occupants, and requested identification from respondent Sharpe and his companion. Sharpe produced a Georgia driver's license bearing the name Raymond J. Pavlovich (I Tr. 54). Cooke then attempted for several minutes to radio Thrasher to determine whether he had succeeded in stopping the pickup, but he was unable to make contact, apparently because Thrasher was not in his patrol car. Approximately 10 to 15 minutes after the initial stop of the Pontiac, two local Myrtle Beach policemen arrived at the location of that stop to remain with Sharpe and his companion while Cooke left to locate Officer Thrasher and the pickup (I Tr. 54-57, 100-101).

Meanwhile, Officer Thrasher had succeeded in stopping respondent Savage's pickup truck approximately a half-mile down the highway. As Thrasher got out of his patrol car with his revolver drawn, Savage stepped out of the truck. After searching Savage, Thrasher holstered his weapon and asked Savage to produce his driver's license and vehicle registration. Savage produced a Florida driver's license in his own name and a bill of sale in the name of Pavlovich. Noting that the truck bore South Carolina license plates, that the bill of sale bore a Georgia address and that Savage's license was from Florida, Thrasher questioned Savage about the ownership of the truck. In response to the officer's questions, Savage stated that the vehicle belonged to a friend, that it was empty, and that he was taking it to get the shock absorbers fixed. He also denied speeding on the campground road and stated that Thrasher was not behind him when he drove through the area. When Thrasher told Savage that Cooke was a DEA agent and would be arriving shortly, Savage became nervous, requested that Thrasher return his driver's license, and asked permission to leave. Thrasher responded that Savage was not free to leave, that he would be detained until Cooke's arrival, and that he could be held on speeding charges if necessary (I Tr. 146-150, 163-165).

When Agent Cooke arrived, approximately 20 minutes after the truck had been stopped, he identified himself, examined the bill of sale that Savage had produced, and observed that the name on it matched the name on the driver's license that Sharpe had produced. Cooke told Savage that he suspected that the pickup contained marijuana. He requested permission to search the truck, but Savage declined, explaining that he was not the owner of the vehicle (I Tr. 61,

103-105). Cooke then stepped onto the rear bumper and, noting that the truck did not move in response, confirmed his suspicion that the truck was heavily loaded. Cooke then leaned against the rear window of the camper top, took a deep breath, and "smelled a very strong and distinct odor of marijuana" (I Tr. 62, 151). Using keys that he removed from the vehicle's ignition, Agent Cooke opened the rear door of the camper and found inside a large number of burlap-wrapped bags, which he described as "similar to the large number of bales of marijuana [he had] encountered over the * * * years" that he had been employed as a DEA agent (I Tr. 62-63, 151-152).

Cooke then placed Savage under arrest and left him in Officer Thrasher's custody while he returned to the Pontiac to arrest Sharpe and his companion (I Tr. 63, 119).[3] In all, 30 to 40 minutes elapsed between the initial stop of the Pontiac and the arrests of Savage and Sharpe following the discovery of the marijuana bales in the pickup (I Tr. 120; App. B, *infra*, 17a).

Later that day, the pickup truck was taken to the Federal Building in Charleston, South Carolina. Two or three days later, DEA agents removed from the truck 43 bales weighing a total of 2,600 pounds and, acting without a search warrant, selected eight bales at random, punctured their coverings, and withdrew core samples for laboratory analysis (I Tr. 65-68). The analysis confirmed that the substance was mari-

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[3] The charges against Sharpe's companion were ultimately dismissed (App. B, *infra*, 16a). After Cooke left the location at which the pickup truck had been stopped, Savage attempted to bribe Thrasher, stating that if Thrasher would remove Savage's handcuffs and permit him to escape, "the owner of the truck would send [Thrasher] thirty thousand dollars" (I Tr. 154).

juana. On the basis of this evidence, the district court denied respondents' motions to suppress the contraband and to suppress Sharpe's pseudonymous driver's license and the bill of sale for the pickup truck (I Tr. 221-222; II Tr. 151-154).

2. A divided court of appeals reversed respondents' convictions (App. B, *infra*, 14a-51a). The majority assumed that Agent Cooke "had an articulable and reasonable suspicion that [respondents] were engaged in marijuana trafficking when he and Thrasher stopped the Pontiac and the truck" (*id.* at 19a). But the court held the investigative stops of respondents unlawful because they "failed to meet the requirement of brevity" (*ibid.*) thought to govern such detention on less than probable cause, which it inferred from this Court's decisions in *Dunaway* v. *New York*, 442 U.S. 200 (1979), *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), and *Terry* v. *Ohio*, 392 U.S. 1 (1968). The court of appeals relied particularly (App. B, *infra*, 19a-20a) upon language in *Brignoni-Ponce* describing a *typical* border patrol investigatory stop (stated to be permissible if based on reasonable suspicion) as " 'usually consum[ing] no more than a minute.' " 422 U.S. at 880, quoting Brief for the United States at 25. The majority considered only the duration of the respondents' detention in holding that the encounter had exceeded the scope of investigation permissible on the basis of reasonable suspicion. Noting that "Sharpe was detained * * * for thirty to forty minutes before Cooke returned to the Pontiac to arrest him, and [that] Savage was held * * * by Thrasher for at least fifteen minutes before being questioned and finally arrested by Cooke," the majority concluded that "the length of the detentions effectively transformed them into de facto arrests without bases in probable cause" and that the deten-

tions therefore constituted unlawful seizures under the Fourth Amendment (App. B, *infra*, 20a).

The court further concluded that the shipment of marijuana discovered in the pickup truck should have been suppressed as the fruit of the unlawful detention of respondents (App. B, *infra*, 21a-22a).[4] The court reasoned that, but for the extended detention of Savage, "Cooke obviously would not have had the opportunity to smell the raw marijuana, and thus would have had no reason to search the truck" (*id.* at 22a). The fact that the odor of marijuana was apparent to Agent Cooke when he approached the truck was deemed irrelevant because "Cooke's smelling of the marijuana was so intertwined with the circumstances of the unlawful detentions" (*ibid.*).

As an alternative basis for mandating suppression of the contraband, the court of appeals majority held that the DEA agents' warrantless search of the burlap-wrapped marijuana bales discovered in the pickup truck violated the Fourth Amendment (App. B, *infra*, 23a-25a). The court concluded that, under either the analysis adopted by the plurality opinion in *Robbins* v. *California*, 453 U.S. 420 (1981), or the expectation-of-privacy analysis employed in Justice Powell's concurring opinion in that case (*id.* at 429-430), the warrantless search of the bales was impermissible.

Judge Russell dissented (App. B, *infra*, 26a-51a). He disagreed with the majority's initial holding that an investigative detention on less than probable cause is invariably unlawful if more than momentary. Instead, he wrote, in determining whether the length of

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[4] The court of appeals deemed it unnecessary to decide whether Sharpe's driver's license and the bill of sale covering the truck should have been suppressed (App. B, *infra*, 22a n.2).

detention renders a particular stop unreasonable, the courts must look to the totality of the circumstances justifying the detention (*id.* at 29a). Judge Russell observed that any delay that prolonged respondents' detention in this case was not attributable to the law enforcement officers, but was occasioned by respondent Savage's efforts to avoid being stopped together with respondent Sharpe. Because it was reasonable to detain both respondents for questioning by DEA Agent Cooke concerning their suspected joint drug trafficking activities, Judge Russell concluded that the detention of respondents did not violate the Fourth Amendment (*id.* at 29a-38a).

Judge Russell also rejected the majority's alternative holding disapproving the warrantless search of the marijuana bales (App. B, *infra*, 39a-51a). He reasoned that the distinctive odor emanating from the 2,600 pounds of marijuana effectively "place[d] the contents of the bales in 'plain view' " (*id.* at 44a-45a) and accordingly rendered their warrantless search permissible.

3. After rehearing en banc was denied by an equally divided court,[5] the United States sought review in this Court. Our petition, No. 81-1736, presented three questions for review: whether the investigative detention of respondents was unlawfully prolonged; whether the marijuana found in the pickup truck was correctly found to be a fruit of any unlawful detention; and whether the warrantless search of the bales was itself unlawful. This Court granted the petition, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of the intervening decision in *United States* v.

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[5] See 81-1736 Pet. App. 39a-40a.

Ross, 456 U.S. 798 (1982). *United States* v. *Sharpe*, 457 U.S. 1127 (1982).[6]

4. On remand, a divided court of appeals again reversed the convictions (App. A, *infra*, 1a-13a). The majority concluded that, in light of *Ross*, it was required to "disavow" (App. A, *infra*, 2a) its alternative holding disapproving the warrantless search of the marijuana bales. But "[f]inding that *Ross* does not adversely affect our primary holding that the initial stop of the vehicle and the lengthy detention of the two defendants constituted illegal seizures," the court readopted the prior opinion as modified, reaffirmed its previous decision, and reversed the convictions (*id.* at 2a-3a).

Judge Russell again dissented. In his view this Court's remand required the court of appeals to reconsider its conclusion that the detention of respondents was unlawfully prolonged (App. A, *infra*, 5a-7a).[7] Addressing that issue, he urged that the court's adherence to its prior decision was inconsistent with *Michigan* v. *Summers*, 452 U.S. 692 (1981), and improperly failed to take into account the respondents'

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[6] Justice Stevens, joined by Justices Brennan and Marshall, dissented from this disposition, stating (457 U.S. at 1128):

> The issue presented in this case is whether a warrantless search [of respondent's vehicle] was itself legitimate. Since our opinion in *United States* v. *Ross* sheds no light on the proper disposition of the case, I respectfully dissent.

[7] The majority declined the urging of the dissent to reconsider its "principal holding or to reargue the same issues that were addressed in detail in the original majority and dissenting opinions," reasoning that its action complied with this Court's mandate (App. A, *infra*, 2a n.1).

responsibility for the circumstances that prolonged their detention (App. A, *infra*, 8a-9a).[8]

REASONS FOR GRANTING THE PETITION

1. The question whether the police may, on the basis of reasonable suspicion not amounting to probable cause, detain a person for a limited but more than momentary period where necessary to advance their investigation is a matter of great practical importance to federal and state law enforcement authorities. If allowed to stand, the holding of the court below that, absent probable cause, investigatory stops that are more than momentary are per se unreasonable under the Fourth Amendment, without regard to the facts or circumstances that affect the duration of the detention, will seriously impede legitimate investigate activities by law enforcement officers. The decision below is also fundamentally at odds with the pertinent decisions of this Court and is inconsistent with decisions of other courts of appeals that have addressed the issue.

a. In *Michigan* v. *Summers* this Court held that it was lawful for the police to detain the occupants of a house on less than probable cause while executing a warrant authorizing a search of the premises for contraband. In reaching this result, the Court recognized that "some seizures significantly less intrusive than an arrest have withstood scrutiny under the

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[8] Prior to entry of the court of appeals' judgments on remand, the opinions were circulated to the full court. A suggestion for sua sponte en banc reconsideration was made by a member of the court but failed to garner the necessary majority vote. Nevertheless, the opinions on remand reflect that the full court was divided five to four in favor of the decision of the panel majority (App. A, *infra*, 3a, 4a, 13a).

reasonableness standard embodied in the Fourth Amendment" (452 U.S. at 697) even though supported by less than probable cause. Moreover, the Court emphasized (*id.* at 700; footnote omitted) that

> the exception for limited intrusions that may be justified by special law enforcement interests is not confined to the momentary, on-the-street detention accompanied by a frisk for weapons involved in *Terry* [v. *Ohio*, 392 U.S. 1 (1968)] and *Adams* [v. *Williams*, 407 U.S. 143 (1972)].

The Court explained (*id.* at 700 n.12):

> If the purpose underlying a *Terry* stop—investigating possible criminal activity—is to be served, the police must under certain circumstances be able to detain the individual for longer than the brief time period involved in *Terry* and *Adams*.

The Court also quoted with approval Professor La Fave's comments on the permissible scope of investigative detention based on reasonable suspicion:

> "It is clear that there are several investigative techniques which may be utilized effectively in the course of a *Terry*-type stop. The most common is interrogation, which may include both a request for identification and inquiry concerning the suspicious conduct of the person detained. Sometimes the officer will communicate with others, either police or private citizens, in an effort to verify the explanation tendered or to confirm the identification or determine whether a person of that identity is otherwise wanted. Or, the suspect may be detained while it is determined if in fact an offense has occurred in the area, a process which might involve checking certain premises, locating and examining objects abandoned by the suspect, or talking with other peo-

> ple. If it is known that an offense has occurred in the area, the suspect may be viewed by witnesses to the crime. There is no reason to conclude that any investigative methods of the type just listed are inherently objectionable; they might cast doubt upon the reasonableness of the detention, however, if their use makes the period of detention unduly long or involves moving the suspect to another locale."

Michigan v. *Summers*, *supra*, 452 U.S. at 700-701 n.12, quoting 3 W. LaFave, *Search and Seizure* § 9.2, at 36-37 (1978). Professor LaFave's summary of the governing principles concludes that the permissibility of extending a *Terry* stop should turn on "whether the police are diligently pursuing a means of investigation which is likely to resolve the matter one way or another very soon and whether it is rather essential to the investigation that the suspect's presence be continued during that interval." *Id.* at 40. See *Michigan* v. *Summers*, *supra*, 452 U.S. at 701-702 n.14. Thus, while *Summers* itself involved the detention of a suspect in the course of conducting a warrant-authorized search of his premises, the Court's analysis clearly demonstrates that a law enforcement officer making a valid *Terry* stop may also lawfully detain the suspect for more than a brief moment if such action is reasonably required in order to pursue a legitimate avenue of investigation.

The Court's recent decision in *United States* v. *Place*, No. 81-1617 (June 20, 1983), reaffirms these principles.[9] Although the Court held there that "on

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[9] *Place* was decided ten days prior to filing of the decision below, and the court of appeals' opinion reflects no awareness of *Place* (see App. A, *infra*, 10a-11a (Russell, J., dissenting, noting grant of certiorari in *Place*)), probably because the

the facts presented" (slip op. 13) the 90-minute investigative detention was unduly prolonged, it once again acknowledged "the reasonableness of seizures longer than the momentary ones involved in *Terry*, *Adams*, and *Brignoni-Ponce*" (slip op. 12). To be sure, the Court recognized (as do we) that "the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion" (slip op. 12-13). But the Court pointedly "decline[d] to adopt any outside time limitation for a permissible *Terry* stop" (slip op. 13), explaining that adoption of a "rigid time limitation," such as the 20 minute period allowed by the American Law Institute's Model Code of Pre-Arraignment Procedure, would be unwise because it "would undermine the * * * important need to allow authorities to graduate their responses to the demands of any particular situation." Slip op. 13 & n.10. Moreover, the Court emphasized that the reasonableness of a given period of detention cannot be assessed without regard to the diligence—or lack thereof—of police in pursuing their investigation by reasonably available means. Slip op. 13.

The courts of appeals have also upheld the detention of a suspect beyond a momentary stop in a number of different settings, where the justification for extending the detention outweighed the intrusion on the suspect's privacy. For example, in *United States* v. *Short*, 570 F.2d 1051, 1054-1055 (D.C. Cir. 1978), the court held that it was permissible for the police

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court of appeals' opinion was prepared well in advance of filing (see *id.* at 3a). The court of appeals' failure to consider *Michigan* v. *Summers*, noted in Judge Russell's original dissent (App. B, *infra*, 28a, 37a), is less readily explicable.

to detain a burglary suspect, whom they lacked probable cause to arrest, for the purpose of transporting the suspect to the scene of the burglary for possible identification by the victim. Accord, *United States* v. *Wylie*, 569 F.2d 62, 70-71 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978). And in *United States* v. *O'Looney*, 544 F.2d 385, 389 (9th Cir.), cert. denied, 429 U.S. 1023 (1976), the court concluded that the Fourth Amendment permitted the police to detain a person suspected of smuggling firearms for the period necessary to obtain the presence of a law enforcement officer with specific expertise in conducting investigations of such offenses. Accord, *United States* v. *Moore*, 638 F.2d 1171, 1174 (9th Cir. 1980), cert. denied, 449 U.S. 1113 (1981) (approving investigative detentions necessary to obtain presence of police officers with special expertise; collecting cases).[10]

b. The decision of the court of appeals is plainly contrary to the foregoing teaching of this Court, and to the above-cited decisions of other courts of appeals. In light of the Court's unequivocal statements in *Summers* and *Place* that *Terry*, *Adams* and *Brignoni-*

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[10] See also *United States* v. *Richards*, 500 F.2d 1025, 1029 (9th Cir. 1974), cert. denied, 420 U.S. 924 (1975) (approving detention of two persons suspected of drug smuggling for more than an hour while DEA agents checked with the Federal Aviation Administration to determine whether the aircraft in which the suspects were about to depart was stolen); *United States* v. *Mayes*, 524 F.2d 803, 805-808 (9th Cir. 1975) (upholding detention of suspected drug smuggler for an hour and a half while Border Patrol agents attempted to verify or disprove suspect's exculpatory explanation concerning his activities); *United States* v. *Contreras-Diaz*, 575 F.2d 740, 745 (9th Cir.), cert. denied, 439 U.S. 855 (1978) (inability of suspected illegal aliens to furnish valid identification justified their prolonged detention to permit a check with the Border Patrol).

Ponce do not mark the outer perimeter of permissible investigation, the court of appeals' reliance upon those very cases to establish a rigid limit of a few minutes upon the duration of such detentions is clearly unwarranted. And the court of appeals' refusal to consider the law enforcement purposes to be served by the detention, the time needed reasonably to effectuate those purposes, or the circumstances of this case that prolonged respondents' detention is contrary to the explicit directions of this Court.

Here the totality of the circumstances demonstrates the reasonableness of respondents' detention. First, the court of appeals did not dispute that at the time he asked Officer Thrasher to signal respondents' vehicles to stop, Agent Cooke had a reasonable suspicion that respondents were engaged in illegal activity. Cooke observed the vehicles during the early morning hours as they travelled in tandem for 21 miles in an area near the coast frequented by drug traffickers. In addition, the pickup truck appeared to be heavily loaded and the windows of the camper were covered. Finally, respondents' vehicles took evasive actions and began speeding after Thrasher, in his marked police car, joined Agent Cooke in following respondents. Based on these facts, Cooke acted properly in attempting to stop respondents' vehicles for the limited purpose of questioning respondents about their activities and attempting to ascertain whether the pickup was loaded with drugs.[11]

It is similarly clear that the 30 to 40 minute period of detention between the initial stopping of respond-

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[11] We note in addition that Officer Thrasher apparently had probable cause to arrest both respondents for speeding. Thus, there can be no question as to the propriety of the initial stop of either respondent.

ent Sharpe and his arrest, and, a fortiori, the roughly 25 minutes elapsed in respondent Savage's case, was entirely reasonable under the circumstances. Agent Cooke diligently pursued his investigation, seeking assistance when necessary from other law enforcement agencies, both state and local. See pages 3-4, *supra*. Compare *United States* v. *Place*, *supra*, slip op. 13 & n.9; *Florida* v. *Royer*, No. 80-2146 (Mar. 23, 1983), slip op. 14-15 (opinion of White, J.). This diligent pursuit of the investigation strongly supports a determination of reasonableness. *United States* v. *Place*, *supra*, slip op. 13; *Michigan* v. *Summers*, *supra*, 452 U.S. at 701-702 n.14.

Moreover, as Judge Russell observed in his dissent below (App. B, *infra*, 29a-31a, 38a), the delay found excessive by the majority was no fault of the officers but was almost entirely attributable to the evasive action taken by respondent Savage, which resulted in respondents' being stopped a half-mile apart by different law enforcement officers. The fact that respondents were stopped at separate locations made it impossible for Cooke, the only DEA agent on the scene, to inspect the pickup truck, which was the focus of his suspicion, and to question its driver, respondent Savage, until police reinforcements arrived to maintain the status quo with respect to respondent Sharpe.[12] Cooke's unsuccessful efforts to contact Offi-

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[12] Consideration of the alternatives open to Agent Cooke is instructive. He could simply have ignored his by then substantially heightened suspicions and permitted Sharpe to go—a course of action that many reasonable people would surely view as quite irresponsible in the circumstances. Or, assuming that his vehicle was equipped to transport respondent Sharpe (and his passenger) securely, and that it was prudent to leave Sharpe's Pontiac unguarded, Agent Cooke might have taken Sharpe to the location where Officer Thrasher had

cer Thrasher by radio, his wait for reinforcements, and his trip from Sharpe's Pontiac to the pickup, all necessitated by the separation, consumed most of the period—perhaps 20-25 minutes (I Tr. 103). Once Cooke finally reached the pickup, less than 10 minutes elapsed before he discovered the marijuana, placed Savage under arrest, and returned to arrest Sharpe (I Tr. 105, 114, 120).[13] In short, the officers' actions in stopping respondents and detaining them for a limited period to pursue a legitimate investigation into suspected criminal conduct is simply an example of good police work. The officers' "graduate[d] * * * responses to the demands of [the] particular situation" (*United States* v. *Place*, *supra*, slip op. 13 n.10) plainly meet the Fourth Amendment's standard of reasonableness.[14]

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stopped Savage. But even if this were otherwise feasible, it would have required handcuffing Sharpe, placing him in a locked police car, and transporting him some distance—thereby elevating the intrusive character of the detention. And, although we would argue otherwise, the very act of transporting Sharpe might itself support a claim that investigative detention had become a custodial arrest. See *Florida* v. *Royer*, *supra*, slip op. 13 (opinion of White, J.). Plainly, the consequences of these alternatives suggest that the course adopted by Agent Cooke was at least reasonable, if not the only one open to him under the Fourth Amendment.

[13] Any time elapsed while Agent Cooke returned to the location where Sharpe was waiting is irrelevant for the additional reason that probable cause to arrest him had, by that point, arisen.

[14] The court of appeals' reliance (App. B, *infra*, 20a) on *Dunaway* v. *New York*, 442 U.S. 200 (1979), is misplaced. *Dunaway* did not hold that a detention that is extended by circumstances beyond the control of the officers is unreasonable under the Fourth Amendment. In *Dunaway*, police, acting on information (not amounting to probable cause) that

2. Even if the court of appeals were correct in concluding that the duration of the detentions rendered the seizures of respondents unreasonable under the

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implicated Dunaway in a murder, went looking for him and, after locating him at a neighbor's house, placed him in a police car and brought him to a police station without his consent. There, after being given *Miranda* warnings, Dunaway was interrogated in a custodial setting for a period of an hour, at which point he confessed to the crime. Although Dunaway had not been formally arrested and charged with a crime, the Court held that his detention without probable cause was unlawful because it was "in important respects indistinguishable from a traditional arrest" (442 U.S. at 212). In support of this characterization the Court noted the extended interrogation to which Dunaway was subjected, the involuntary transfer to the police station, and the use of an interrogation room, as well as the fact that he was not told he was free to go and in fact would not have been allowed to depart had he attempted to do so. Here, by contrast, the detention was considerably briefer than in *Dunaway*, and its length was not attributable to the deliberate actions of the officers. Moreover, respondents were not transported to a police station and placed in an interrogation room, but were questioned briefly when they were stopped.

The holding of *Florida* v. *Royer*, *supra*, that the investigative detention there had gone beyond permissible bounds is similarly distinguishable. The Court's decision there rests upon the use of unnecessarily intrusive means of investigation and conditions of restraint (see slip op. 11-12 & n.9, 13-15 (opinion of White, J.)) that have no analogue here. Moreover, the detention in that case lasted approximately 15 minutes—far more than the few minutes the court of appeals thought permissible here—and yet the plurality opinion did not suggest any illegality in the duration of the stop. Rather Justice White emphasized that the "scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case," adding that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop" (slip op. 8-9). As

Fourth Amendment, it erred in holding that the marijuana discovered in respondent Savage's pickup truck was a suppressible fruit of the improper duration of the detention. In our view, this holding stems from an erroneous application of established Fourth Amendment principles to the facts at hand.

In determining whether evidence is a "fruit" of illegal conduct, the Court has rejected a simplistic test of "but for" causation. *Wong Sun* v. *United States*, 371 U.S. 471, 487-488 (1963). See also *United States* v. *Ceccolini*, 435 U.S. 268, 274 (1978); *Brown*

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we have explained above, the actions of the officers in this case meet these criteria.

The other court of appeals decisions cited by the majority below (App. B, *infra*, 21a) do not support the result reached here. In *United States* v. *Chamberlin*, 644 F.2d 1262 (9th Cir. 1980), cert. denied, 453 U.S. 914 (1981), the court held that the defendant's 20-minute detention was unreasonable in the absence of probable cause, specifically noting that the defendant "was not questioned briefly where he was found. He was placed in the back seat of a police car for twenty minutes." *Id.* at 1267. In *United States* v. *Perez-Esparza*, 609 F.2d 1284 (9th Cir. 1979), the defendant was removed from his car and taken to a Border Patrol office, where he was detained for three hours in an interrogation room pending the arrival of DEA agents. Finally, in *United States* v. *Miller*, 546 F.2d 251 (8th Cir. 1976), the court held that a gun discovered during a frisk of the defendant should have been suppressed because the defendant was "seized and wrongfully detained for an *unnecessarily* long period against his will" (*id.* at 253; emphasis supplied), and also because the officer did not have a sufficiently particularized suspicion that the defendant was carrying a weapon or otherwise posed a threat to the officer (*id.* at 254). While we do not necessarily agree with the results in these cases, none of them analyzes the propriety of the detention solely in terms of duration. Moreover, when contrasted with the decisions discussed above at pages 14-15, *supra*, these decisions reflect the considerable uncertainty that surrounds this area of the law.

v. *Illinois*, 422 U.S. 590, 598, 603 (1975). In *Wong Sun* (371 U.S. at 487-488) the Court declined to "hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." Rather, the Court explained (*ibid.*, quoting J. Maguire, *Evidence of Guilt* 221 (1959) (emphasis added)):

> the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by *exploitation of that illegality* or instead by means sufficiently distinguishable to be purged of the primary taint."

In this case, the discovery of the marijuana in the pickup did not in any meaningful way result from the fact that respondents' detentions were extended beyond a couple of minutes.

The court of appeals reasoned that Agent Cooke's discovery of the marijuana was a product of the length of respondents' detention because "Cooke obviously would not have had the opportunity to smell the raw marijuana, and thus would have had no reason to search the truck, had Savage not been detained for longer than constitutionally permissible under an investigatory stop" (App. B, *infra*, 22a). However, this is precisely the sort of "but for" test that this Court has consistently rejected. A proper fruits analysis should have focused instead on whether the information establishing that there was probable cause to believe that the pickup contained marijuana was obtained by Agent Cooke through exploitation of the hypothetically overlong detentions of respondents. This entails a separate inquiry as to each respondent.

a. With respect to respondent Savage, we submit that the information that a strong odor of marijuana

emanated from the pickup truck was immediately discoverable, and thus, although discovery of that information was delayed, the information itself should be deemed a fruit of the lawful stop and not of any allegedly unlawful prolongation of the detention. This is not a case in which a time-consuming search was needed to uncover evidence. In such a case the evidence may plausibly be said to result from "exploitation" of the illegality—the duration of the detention. But at the time of the initial stop of respondent Savage's pickup, Agent Cooke was well acquainted with the distinctive odor of marijuana; the extended nature of Sharpe's detention clearly did not enhance Cooke's ability to smell and accurately to identify that odor. See *United States* v. *Crews*, 445 U.S. 463, 472 (1980). Moreover, there is no reason to suppose that the odor of marijuana from the pickup became more pronounced, and thus more easily discoverable, as a result of the prolonged detention. Accordingly, as in *Michigan* v. *Summers*, *supra*, 452 U.S. at 701 (footnote omitted), this is not a situation in which suppression is warranted because the detention was "unduly prolonged in order to gain more information"; instead, the information was "obtained through [detection of the readily apparent odor of marijuana] and not through the detention."

This case is readily distinguishable in this respect from other situations in which an unlawful detention has been held to taint the discovery of evidence. For instance, in *Dunaway* v. *New York*, *supra*, given the finding of a de facto arrest based on the maintenance of interrogation in custodial conditions, it was not unreasonable (in the absence of an intervening act of free will) to treat a confession secured at the end of the period of detention as evidence arrived at by ex-

ploitation of the unreasonable conditions and duration of the detention. Similarly, in *Florida* v. *Royer*, *supra*, where the evidence was found through a consent to search personal luggage given while an individual was unlawfully detained, it was reasonable to conclude that the intrusiveness of the detention contributed to the defendant's consent. But what was discovered here was *real evidence*. Thus the fruits analysis here is not to be influenced by a possibility that the duration of detention contributed to ensuing statements or actions of the defendant.

The court of appeals' analytical error has considerable theoretical importance and has significant adverse practical implications for administration of the exclusionary rule. Under the analysis employed by the court of appeals, any real evidence found at the scene of an unlawfully extended investigative detention apparently will be deemed tainted; it is difficult to conceive of any circumstances that would be recognized as dispelling the taint. There is no warrant for this sweeping application of the exclusionary rule.

b. As to the detention of respondent Sharpe, the court of appeals' confusion is much clearer. The discovery of the marijuana was a product of the stop of Savage (albeit not of the duration of that stop); it plainly was not the result (under *any* standard of causation) of any official impropriety connected with the detention of respondent Sharpe. Accordingly, the marijuana may in no event properly be suppressed (as to either respondent) on the basis of the somewhat greater duration of the detention of Sharpe (see also page 18 note 13, *supra*).[15] Moreover, the discov-

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[15] Indeed, the court of appeals' fruits analysis appears to focus exclusively upon the question whether the detention of Savage tainted the discovery of the marijuana (App. B, *infra*,

ery of the marijuana following *Savage's* detention "invaded no right of privacy of person * * * which would entitle [Sharpe] to object to its use at his trial." *Wong Sun* v. *United States*, *supra*, 371 U.S. at 492.[16]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1983

22a). The court of appeals' conclusion that Sharpe's detention was unlawful may accordingly be surplusage. But it is not clear that the court of appeals' determination that the detention of Savage was unlawful was based entirely on the duration of *his* detention.

[16] For the same reason, of course, if suppression were required solely because of the duration of Sharpe's detention, it would not inure to the benefit of respondent Savage.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 79-5314

WILLIAM HARRIS SHARPE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 79-5315

DONALD DAVIS SAVAGE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

On remand from the Supreme Court of the United States

Submitted: July 27, 1982 Decided: June 30, 1983

Before WINTER, RUSSELL, and ERVIN, Circuit Judges.

ERVIN, Circuit Judge:

The Supreme Court has vacated our decision in *Sharpe v. United States*, 660 F.2d 967 (1981), and has remanded[1] this case to us, —— U.S. ——, 73 L.Ed.2d 1345 (1982), with the direction that we reconsider it in light of *United States v Ross*, 456 U.S. ——, 72 L.Ed.2d 572 (1982). We have now done so. We conclude that by virtue of *Ross*, the decision of the Supreme Court in *Robbins v. California*, 453 U.S. 420 (1981), upon which we relied as an alternative basis for our decision in *Sharpe*, is no longer valid. Accordingly, we disavow the rationale set forth in Section IV of the majority opinion. We also modify Section V of that opinion by deleting therefrom the words "either . . . or because the warrantless search of the bales was unlawful."

Finding that *Ross* does not adversely affect our primary holding that the initial stop of the vehicle and the lengthy detention of the two defendants constituted illegal seizures, we readopt the majority

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[1] The Supreme Court's order reads, in part . . . "this cause is remanded . . . for further consideration in light of *United States v. Ross*, 456 U.S. —— (1982)." We have complied with this mandate. We do not believe it is appropriate, despite the urging of our dissenting brothers, to go beyond this explicit instruction and to reexamine our principal holding or to reargue the same issues that were addressed in detail in the original majority and dissenting opinions. Our conviction that we should so limit our reconsideration is buttressed by the comments of the dissenting justices who are clearly focusing only on the application of *Ross* to our principal holding. Had the Supreme Court felt that a reversal was in order, it could and would have said so. If we have misconceived the Court's wishes, the future will take care of that omission on our part.

opinion as modified herein, reaffirm our previous decision, and reverse the convictions.

I am authorized to state that Chief Judge Winter, a member of the original panel, and Judges Phillips, Murnaghan, and Sprouse join in the views expressed in this opinion.

RUSSELL, Circuit Judge, dissenting:

When an opinion-order by the majority on remand of this appeal by the Supreme Court, which opinion-order was for all practical purposes in the same language as the present opinion distributed as of May 30, 1983, was first submitted by the majority of the panel on November 16, 1982, I promptly submitted my dissent on November 19, 1982. On the same date there was filed a motion by an active member of the Court to hear *en banc* this opinion-order. When the motion did not command the required Court majority, I again on December 14, 1982, submitted a dissent.

The majority has now submitted the present opinion and order. I reiterate my dissent both to the original opinion-order and to the denial of *en banc* hearing.

I submit my dissent to the denial of *en banc* hearing as my dissent to the present opinion-order herein. This dissent is as follows:

RUSSELL, Circuit Judge, dissenting:

I hesitate to file another dissent in this case, this time on the denial of a motion, made by a member of this Court, for an *en banc* hearing on an order on remand from the Supreme Court. I feel so strongly that our action on remand is contrary to the mandate of the Supreme Court that I am compelled again to state my views.

Implicit in the decision filed by the majority on remand in this case is the assumption that the Supreme Court overlooked inadvertently that the majority's original decision which was vacated by the Supreme Court rested "primarily" on a sound ground that was not involved in *United States v. Ross*[1] and that, therefore, it was not necessary to disturb the result or to vacate the reversal of the convictions below as decided by the panel majority in their initial opinion. What the majority of this Court plainly stated is that the Supreme Court in reviewing this case failed to consider the ground on which the majority of our panel decided this case. I find, with due deference for the contrary opinion of my brothers, this to be a misreading of the Supreme Court decision.

I suggest with the utmost confidence that the majority of the Supreme Court did not overlook the first ground given by the majority of this Court for its initial decision, as the majority inaccurately would believe. Three members of the Supreme Court, in dissent, noted in particular this very ground and, to some extent at least, indicated they thought the Supreme Court should address it as entitled to some consideration in this context. The majority of the Supreme Court obviously did not agree and proceeded,

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[1] *United States v. Ross*, 456 U.S. —— (1982).

by their action, to demonstrate (conclusively I suggest) that they did not feel that the first ground listed in our prevailing panel opinion provided any arguable basis for reversing the convictions below. Had they thought otherwise, they would simply have affirmed the reversal of the convictions as ordered in our initial opinion herein. I say that because it is a well-settled and oft-repeated rule of appellate procedure that, if the result of the decision which is challenged on appeal is correct for any reason, whether stated by the lower court or not, the decision of the lower court is affirmed. *Riley Co. v. Commissioner*, 311 U.S. 55, 59 (1940); *Helvering v. Gowran*, 302 U.S. 238, 245 (1937). I am sure the Supreme Court is as well aware of its own Rules as we are. Under this rule, if the first ground in our initial opinion had been, in the opinion of the majority of the Supreme Court correct and supported a reversal of the convictions below, as the majority found in our panel opinion, the Supreme Court would have affirmed that opinion; better still, it would probably not have granted certiorari at all in this case. It did not do this; however. On the contrary, it vacated our decision and instructed us to decide the case on the basis of *United States v. Ross*.

The order on remand by us would assume, though, that the Supreme Court did not decide that *United States v. Ross* was controlling on the decision in this case and did not instruct us to decide this appeal on remand on the basis of *United States v. Ross;* it, in the opinion of the majority of the panel, only instructed us to "consider" *United States v. Ross* but left to us to determine, after considering *Ross*, whether it had any relevancy to the result reached by us in this case. Once again, I think the majority

has mistaken gentleness in instruction for indefiniteness in command. The Supreme Court was seeking to be gentle with us but there is, I submit, no mistaking what they expected us to do. The Supreme Court thought *Ross* both relevant and dispositive and I would accept the plain direction of the Supreme Court.

I think it is plain why the majority of the Supreme Court didn't waste time on the first point made in our initial opinion herein. This is obvious when we look at the only detention and the only search really relevant in this action. Let's focus on the only search that was important in this case.[2] That was the search of the van. It was the contraband in the van that convicted the defendants. The Pontiac car was only the lead car or guide for the van and its cargo of contraband. The Pontiac apparently transported no marijuana. The convincing evidence was in the van; the search and seizure of the van provided the critical evidence in the case; it was the suppression of the fruits of that search that was vital in this case and that made inescapable the proof of the guilt of the defendants. I say this because only if that search could be invalidated could the defendants keep out of the trial the contraband, the evidence which convicted the defendants. Since the first ground stated in our original opinion focused on the length of the detention or intrusion, the only issue was whether the detention of the van, but only the van, was illegally extended. What was the length of delay in that case?

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[2] In this discussion, I do not review anew the facts of this case. Those facts are adequately detailed in the majority and dissenting opinions in the original decision. *Sharpe v. United States*, 660 F.2d 967 (4th Cir. 1981).

Our original opinion states the length of that delay. It states that: "When Cooke [the DEA agent] arrived approximately fifteen minutes after the truck had been stopped . . . ." 660 F.2d at 969. Later it said: ". . . Savage [the operator of the van] was held under custodial arrest without probable cause by Thrasher [the highway patrolman who stopped the van at the instance of Cooke] for at least fifteen minutes before being questioned and finally arrested by Cooke." 660 F.2d at 970. And why was there a delay of fifteen minutes? The delay was occasioned by Savage's attempt to elude the DEA officer after he and the driver of the lead car had been stopped. Savage had tried to drive off when Cooke went over to the lead car, in the process "almost hitting [the car of the highway patrolman who had assisted Cooke in stopping the caravan]," 660 F.2d at 974 (Russell, dissenting). Is delay secured by such a ploy by a drug trafficker to be rewarded by declaring a delay of but fifteen minutes, and a delay so achieved, unconstitutionally long? I think not.

Approximately a year before our decision the Supreme Court in a case that the majority did not discuss, though it was discussed and relied on in my dissent, had dealt authoritatively with delay in connection with an investigatory *Terry*-type stop. *Michigan v. Summers*, 452 U.S. 692 (1981). In that case the Supreme Court of Michigan had invalidated an investigatory stop of 50 minutes as too long. The United States Supreme Court reversed and, in so doing, declared:

> "The cases recognize that some seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that

> they may be made on less than probable cause, so long as police have an articulable basis for suspecting criminal activity. In these cases, as in *Dunaway*, the Court was applying the ultimate standard of reasonableness embodied in the Fourth Amendment. They are consistent with the general rule that every arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause. But they demonstrate that the exception for limited intrusions that may be justified by special law enforcement interests is not confined to the momentary, on-the-street detention accompanied by a frisk for weapons involved in *Terry* and *Adams*. Therefore, in order to decide whether this case is controlled by the general rule, it is necessary to examine both the character of the official intrusion and its justification." [pp. 699-701]

It added in an explanatory footnote, the following:

> "If the purpose underlying a *Terry* stop—investigating possible criminal activity—is to be served, the police must under certain circumstances be able to detain the individual for longer than the brief time period involved in *Terry* and *Adams*."

After adding this language, the Court cited and quoted a statement from 3 W. LaFave, *Search and Seizure*, providing various circumstances under which detention may be properly extended.

The majority of this Court has taken some descriptive phrases out of *United States v. Brignoni-Ponce*, 422 U.S. 873 at 880, treated them improperly as prescriptive terms, and thereby converted them

into a rule that an investigatory stop could "consume no more than one minute" and could involve "only a brief question or two." 660 F.2d at 970. That the language in *Brignoni-Ponce* was purely descriptive of the circumstances of that case and was not to be treated as a statement of an absolute rule that the detention in an investigatory stop may not be "longer than the brief time period allowed in *Terry* and *Adams*," was unquestionably demonstrated by the language of the Supreme Court in its latest decision on investigatory stops, rendered only a few months ago in *Summer*. What I have never understood is the panel majority's complete reluctance to even note, much less discuss or to consider the Supreme Court's latest decision on investigatory stops in this connection. In that case the Supreme Court very plainly stated that the officers, in effecting an investigatory stop, "must under certain circumstances be able to detain the individual for longer than the brief time period involved in *Terry* and *Adams*." If there ever were 'circumstances" which would warrant "longer" detention than "the brief time period involved in *Terry* and *Adams*, they were present here. The driver of the van himself caused the short delay (*i.e.*, 15 minutes) by seeking to elude the officers and to escape. *Had he not done this, there would have been no delay at all.* What the panel majority, by its ruling, did was to reward his wrongful conduct in seeking to escape by granting him what it describes as constitutional protection. I do not believe we have to go that far in order to uphold the Constitution as a shield for the guilty.

Moreover, on the same day as the Supreme Court remanded this case, it granted certiorari in *United States v. Place*, 660 F.2d 44 (2d Cir. 1981). *See*, 73

L.Ed.2d 1312, 1314. The point in issue was the alleged invalidity of a search and seizure because of the extended time taken in an invesigative stop. The search involved was of baggage rather than of a person but the Court said: ". . . the Fourth Amendment does not draw any distinction between an unlawful seizure of a person and the similar seizure of his property. In both cases there is an infringement of the person's freedom of action." *Id.* at 51. The Court noted that under the *ALI Model Code of Pre-Arraignment Procedure* § 110.2(1) (1975), "a detention not based on probable cause and not consented to [had been] limited to a maximum of twenty minutes' duration." *Id.* at 51. In this case, the officers had seized the defendant's baggage at the airport, "remov[ed] it to another location several miles away for a period of at least 1½ to 2 hours for the admitted purpose of determining whether it contained narcotics." *Id.* at 51. It held that, "[i]n our view this protracted dispossession [of approximately two hours] cannot reasonably be characterized as a *Terry*-type 'investigative stop.'" *Id.* at 52.[3] The Supreme Court has granted certiorari to review that two-hour rule.

I have mentioned *Summers* and *Place* to show that the Supreme Court is alert to the point which the majority assumes was inadvertently passed over by the Supreme Court. It is inconceivable that it ne-

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[3] In *United States v. Regan*, 687 F.2d 531, 537 (1st Cir. 1982), the First Circuit, which found a detention of twenty-two hours too long, said, however, that it was not prepared to accept what it called the Second Circuit's two-hour rule, as stated in *Place*, 660 F.2d at 51, and held that every detention had to be determined on its own facts and circumstances, which was exactly what *Summers* said.

glected to discuss the majority's first ground for reversal of the convictions because it did not perceive the point. The reason the Supreme Court did not advert to the length of the stop was manifestly because it considered the point without merit. To repeat: The only reason the Supreme Court did not feel required to discuss the length of the detention in this case was that the delay of the van was not unconstitutional under any view of the case and certainly not under the standard established so recently in *Summers*. The delay, as the majority found it, was fifteen minutes. This was less than a third the delay in *Summers*, it was one-fourth less than the time allowed under the ALI rule, as quoted in *Place*, and it was one-eighth the delay in *Place*. Moreover, the delay itself was caused by the effort of the driver of the van to elude an investigatory stop. Under such circumstances, the Supreme Court very properly saw no reason to address in any detail the first point in the majority's opinion.

There is another feature to this case that should be observed. After the highway patrolman had stopped the van, the driver offered the patrolman a substantial bribe to allow him to escape. He wanted to avoid being connected with the van. That conduct was the strongest evidence that the van contained contraband and that the driver wanted to disassociate himself from the van. There is no clear evidence when this occurred during the 15 minutes of the detention, but, when it did occur, I submit, the officers had from that time forward probable cause to search the van.

With all deference to my brothers, I cannot agree to a decision which would void the convictions in this case on the ground that a detention of a van for 15 minutes, a delay caused by the driver of the van's

attempt to escape, was an unconstitutional investigative stop. I, therefore, dissent from a denial of *en banc* hearing on the final order entered on remand from the United States Supreme Court.

I am authorized to state that Judges Widener, Hall and Chapman join in this dissent, as they also did in my dissents to the original opinion-order and to the denial of *en banc* hearing.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 79-5314, 79-5315

WILLIAM HARRIS SHARPE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

DONALD DAVIS SAVAGE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Argued Jan. 8, 1981

Decided Sept. 4, 1981

Before WINTER, RUSSELL and ERVIN, Circuit Judges.

ERVIN, Circuit Judge:

William Sharpe and Donald Savage were indicted for possession with intent to distribute a controlled substance (marijuana) under 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.[1] At the hearing on the motions to

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[1] 21 U.S.C. § 841(a)(1) states that "[e]xcept as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

[Footnote continued on page 2a]

suppress, which was conducted during the bench trial of these charges, Sharpe and Savage challenged the admission of certain evidence as the fruit of unlawful searches and seizures in violation of the Fourth and Fourteenth Amendments. The district court denied the motions and consequently found them guilty under the above statutes. We find the denial of the motions to suppress to be error and reverse.

I.

On June 9, 1978, Luther Cooke, an agent with the Drug Enforcement Administration (DEA), on patrol in an unmarked car along the coast of North and South Carolina, an area under surveillance for suspected drug trafficking, spotted a pickup truck with an attached shell camper, followed by a Pontiac. Observing that the truck was riding low in the rear and appeared overloaded, and that a quilted material covered the rear window of the camper, Cooke proceeded to follow the vehicles south. After approximately twenty miles, Cooke determined that he would make an investigatory stop of the vehicles, and he dispatched a request for aid, to which South Carolina Highway Patrolman Thrasher responded.

Some time after Thrasher joined the procession, the Pontiac and the truck turned onto a loop road through a campground. At no time prior to the turn

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[1] [Continued]

18 U.S.C. § 2(a) directs that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal," and § 2(b) states that "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

had the occupants of the truck or vehicle signaled to or communicated with each other, and they did not attempt to do so as they drove the loop road through the campground. Thrasher later testified, however, that the truck and Pontiac were speeding as they drove along that road. At the end of the loop, the vehicles turned back onto the main coastal highway and again proceeded south toward Myrtle Beach.

Shortly thereafter, Cooke stopped the Pontiac and Thrasher stopped the truck. Cooke approached the Pontiac's occupants and identified himself. He requested and received an operator's license from the driver, Sharpe; the license was in the name of Raymond J. Pavlovich. Sharpe and his passenger Davis (the charges against whom were later dropped) were not told why they had been stopped. Several minutes later, Cooke radioed the local police for assistance, and two officers from the Myrtle Beach Police Department eventually arrived, in uniform and armed. Asking the local police to "maintain the situation," Cooke turned custody of Sharpe and Davis over to them and left to join Thrasher, who was with the truck a few blocks further south.

After stopping the truck, Thrasher had approached it with his revolver drawn, had ordered the driver to get out of the truck and to assume a spread-eagle position against its side, and had searched him. At Thrasher's request, the driver had produced a Florida license identifying him as William Savage and a bill of sale for the truck in the name of Pavlovich. Thrasher gave Savage no reason for the stop, but indicated that he would hold him there until Cooke arrived. Savage had then requested the return of his license and permission to leave. Thrasher had refused to return the license and told Savage that he was not free to leave, as he was under custodial arrest, and

that he could detain Savage on speeding charges if necessary.

When Cooke arrived approximately fifteen minutes after the truck had been stopped, he identified himself as a DEA agent, and Thrasher handed him Savage's license and the bill of sale. Cooke twice requested that he be allowed to search the camper and was refused both times. Cooke then stepped onto the rear bumper and observed that it did not lower appreciably. He leaned against the rear of the camper, breathed deeply, and announced that he detected the smell of marijuana. Cooke removed the keys from the ignition, unlocked the camper and searched it, finding a number of highly compressed, well-wrapped burlap bales but no marijuana residue.

After the search of the camper, Cooke placed Savage under arrest and left him in Thrasher's custody while he returned to the Pontiac, where he placed Sharpe under arrest. By the time Sharpe was arrested, approximately thirty to forty minutes had elapsed since Cooke had first stopped the Pontiac.

Cooke then assembled the various parties and vehicles and led them to the Myrtle Beach police station. That evening the truck was driven to the Federal Building in Charleston, and two or three days later, Cooke supervised the unloading of the truck, which contained forty-three intact bales. Eight randomly selected bales were then searched, and analysis of samples taken from them revealed that the bales contained marijuana. No search warrant was obtained prior to the unloading and analyzing of the bales and their contents. Cooke retained two of the eight bales as evidence and stored them in a vault in his office; the rest were destroyed by fire, under the direction of the Assistant United States Attorney and without permission of the district court.

II.

We consider first whether the vehicle stops and the detentions of Sharpe and Savage were unlawful seizures under the Fourth and Fourteenth Amendments.

The Fourth Amendment, applicable to the states through the Fourteenth Amendment, *Mapp* v. *Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), provides that "[t]he right of the people to be secure in their persons . . . and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." U.S.Const. amend, IV. The amendment has been construed generally to allow a law enforcement official to stop a moving vehicle without a warrant and for less than probable cause, if he has an articulable, reasonable suspicion that either the vehicle or any of its occupants is subject to seizure for violation of the law, *see Delaware* v. *Prouse*, 440 U.S. 648, 663, 99 S.Ct. 1391, 1401, 59 L.Ed.2d 660 (1979), and has been read in particular to allow investigatory field stops of vehicles suspected to drug trafficking, *see, e.g., United States* v. *Jiminez*, 602 F.2d 139, 142 (7th Cir. 1979); *United States* v. *Soto*, 591 F.2d 1091, 1099 (5th Cir.), *cert. denied*, 443 U.S. 930, 99 S.Ct. 2862, 61 L.Ed.2d 298 (1979); *United States* v. *Montgomery*, 561 F.2d 875, 879 (D.D.Cir. 1977); *United States* v. *Garcia-Rodriguez*, 558 F.2d 956, 964 (9th Cir. 1977), *cert. denied*, 434 U.S. 1050, 98 S.Ct. 900, 54 L.Ed.2d 802 (1978).

Even though the reasonable suspicion standard requires less evidence of wrongdoing then does a showing of probable cause, the law does not free law enforcement officials from all restrictions concerning vehicle stops. Rather, it imposes upon them two sig-

nificant requirements: first, the reasonable suspicion of illegality must not be based simply on subjective belief but must be supported by articulable and objective facts, and second, the stop must be brief. *See, e.g., United States* v. *Cortez*, —— U.S. ——, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *see also Dunaway* v. *New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979).

We can assume without deciding that Cooke had an articulable and reasonable suspicion that Sharpe and Savage were engaged in marijuana trafficking when he and Thrasher stopped the Pontiac and the truck. We conclude, however, that the stops failed to meet the requirement of brevity.

We cannot overemphasize the importance of the brevity requirement for investigatory stops predicated upon less than probable cause; indeed, it is the transitory nature of the stop that justifies the elimination of the probable cause requirement. We note that the Supreme Court in *Terry* v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), heavily relied upon the short length of a stop on the street and a frisk of weapons in fashioning an exception to the probable cause requirement. Furthermore, when the Court transposed the *Terry* stop and frisk rationale to the vehicle stop situation, it was careful to emphasize the de minimis nature of such stops in justifying the intrusion under the Fourth Amendment. In *Brignoni-Ponce*, for instance, the Court noted that the Fourth Amendment required a weighing of the public interest against the interference with individual liberty that a stop causes, and it justified the border patrol investigatory stop in that case on the ground that the intrusion was "modest," usually "consum[ing] no

more than one minute," and involving only " a brief question or two." 422 U.S. at 880, 95 S.Ct. at 2579-80. The Court further cautioned that "any further detention or search must be based on consent or probable cause." *Id.* at 882, 95 S.Ct. at 2580; *see also United States* v. *Cortez*, —— U.S. at ——, 101 S.Ct. at 694 (denominating investigatory stops as brief).

The stops and detention in this case cannot be described as brief: Sharpe was detained without probable cause for arrest for thirty to forty minutes before Cooke returned to the Pontiac to arrest him, and Savage was held under custodial arrest without probable cause by Thrasher for at least fifteen minutes before being questioned and finally arrested by Cooke. Indeed, the length of the detentions effectively transformed them into de facto arrests without bases in probable cause, unreasonable seizures under the Fourth Amendment. The teaching of the recent case *Dunaway* v. *New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), is enlightening here. In *Dunaway*, the Court held that police violated the Fourth Amendment when, without probable cause but with a reasonable suspicion of illegal conduct, they seized an individual and transported him to the police station for interrogation. In so holding, the Court noted that Dunaway was not merely questioned briefly but was instead transported to the station for interrogation and would have been restrained if he had tried to leave; in sum, the detention "was in important respects indistinguishable from a traditional arrest," *id.* at 212, 99 S.Ct. at 2256, and, not being grounded on probable cause, it was an unconstitutional seizure.

Like the detention in *Dunaway*, the lengthy detentions of Sharpe and Savage by law enforcement officers who had no intention of allowing them to leave custody closely resembled traditional arrests. Because

probable cause did not exist prior to the detentions, we must view them as illegal seizures under the Fourth and Fourteenth Amendments. *See United States* v. *Chamberlin*, 644 F.2d 1262 (9th Cir. 1980) (twenty minute detention of individual in back of parked car, on the basis of a reasonable suspicion that criminality was afoot but without problable cause, was unlawful); *United States* v. *Perez-Esparza*, 609 F.2d 1284 (9th Cir. 1979) (three hour detention at border checkpoint station, including two and one-half hour delay pending the arrival of DEA agents, following valid investigatory field stop of a vehicle, constituted an illegal arrest); *see also United States* v. *Miller*, 546 F.2d 251 (8th Cir. 1976) (frisk for weapons following ten to fifteen minute house search pursuant to valid search warrant not valid under *Terry*, because individual was detained longer than necessary); *cf. United States* v. *Vasquez-Santiago*, 602 F.2d 1069 (2d Cir. 1979), *cert. denied*, 447 U.S. 911, 100 S.Ct. 2998, 64 L.Ed.2d 861 (1980) (relatively brief detention of individual in an airport on the basis of a reasonable suspicion of narcotics violation, was not an unconstitutional intrusion, the detention involving only a couple of minutes of questioning).

III.

Having determined that Sharpe and Savage were illegally detained, we must next inquire whether the bales of marijuana Cooke uncovered during his search of the truck should have been suppressed as fruits of the illegality. *Wong Sun* v. *United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), provides the standard by which we test the admissibility of the incriminating evidence, the appropriate inquiry being "whether, granting establishment of the primary illegality, the evidence to which the instant objection is

made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged by the primary taint." 371 U.S. at 488, 83 S.Ct. at 417 (quoting Maguire, *Evidence of Guilt*, 221 (1959)).

We conclude that this case falls within the first category. Cooke obviously would not have had the opportunity to smell the raw marijuana, and thus would have had no reason to search the truck, had Savage not be detained for longer than constitutionally permissible under an investigatory stop. Clearly a product of Cooke's "exploitation of [the] illegality," evidence of the discovery of the bales should have been suppressed.

The government's argument that the smell of the marijuana supplied probable cause for Cooke to search the truck and thus that the evidence was properly admitted fails to persuade us that the search was constitutional. While we acknowledge that the odor of raw marijuana may provide probable cause to search a vehicle legitimately stopped, *see, e.g., United States* v. *Dien*, 609 F.2d 1038 (2d Cir. 1979), *aff'd on rehearing*, 615 F.2d 10 (1980); *United States* v. *Rivera*, 595 F.2d 1095 (5th Cir. 1979), it could not have done so in this case: Cooke's smelling the marijuana was so intertwined with the circumstances of the unlawful detentions that it could not have purged the illegal taint of those detentions and could therefore not have served as probable cause for a search. The bales thus were illegally seized, and the district court erred when it denied the motion to suppress.[2]

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[2] Because we have determined that the bales of marijuana should have been suppressed, we do not find it necessary to reach the question whether the district court improperly refused to suppress Sharpe's license and the bill of sale for the truck.

IV.[*]

[The bales of marijuana should have been suppressed for another, equally compelling, reason: even if there had been no illegality to taint the discovery of the bales, Cooke should have obtained a warrant before allowing a search and analysis of the bales to proceed in Charleston two or three days after the stops and detentions. We find authority for our conclusion in the Supreme Court's recent decision in *Robbins* v. *California*, —— U.S. ——, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981).]

[The *Robbins* Court reversed a conviction for drug offenses on the ground that a warrantless search of packages of marijuana wrapped in opaque green plastic and stored in the recessed luggage compartment of a station wagon was unconstitutional. Justice Stewart, in a plurality opinion joined by Justices Brennan, White, and Marshall, set forth a bright line rule that any closed, opaque container found in a vehicle during a lawful search may not be opened without a warrant. Relying on the Court's decisions in *United States* v. *Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), in which a warrantless search of a footlocker filled with marijuana and seized from the open trunk of a parked automobile was held unconstitutional, and in *Arkansas* v. *Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), in which the Court held that the warrant requirement applied to the search of a suitcase filled with marijuana and found in the trunk of a stopped vehicle, the plurality rejected the government's argument that a closed container in a vehicle may be subject to a warrantless search under the au-

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* The rationale of the bracketed paragraphs that follow was "disavow[ed]" by the court of appeals when it reconsidered the case upon remand from this Court. See App. A, *supra*, 2a.

tomobile exception. It furthermore rejected a "worthy container" rule, concluding that there is no constitutional distinction to be made among various closed containers such as suitcases, briefcases, portfolios, duffle bags, and boxes: all closed containers manifest an individual's reasonable expectation of privacy in their contents, unless a container by its very appearance betrays an illegal purpose or its contents are exposed to plain view. *See Arkansas* v. *Sanders*, 442 U.S. at 764-65 n.13, 99 S.Ct. at 2593-94 n.13. The plurality stressed, moreover, that the Fourth Amendment does not draw a distinction between personal and impersonal effects; as it succinctly stated, "Once placed within [a closed, opaque container], a diary and a dishpan are equally protected by the Fourth Amendment." —— U.S. at ——, 101 S.Ct. at 2846.]

[Joining in the judgment but not the opinion of the plurality, Justice Powell in a concurring opinion rejected the bright line rule, instead premising his conclusion that the search was unlawful on the ground that the defendant had a reasonable expectation of privacy in the carefully wrapped and sealed packages. While acknowledging the benefits of a bright line rule, Justice Powell reasoned that the plurality's rule in this case placed an unduly heavy burden on law enforcement officers to obtain warrants for the search of trivial containers.]

[Applying *Robbins*, we think that under either the plurality's bright line rule or Justice Powell's reasoning in concurrence, the warrantless search of the bales in the back of the truck was unconstitutional. The well-packaged bales [3] were located in the equivalent

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[3 Each bale consisted of a tube of marijuana wrapped first in paper bags, then in a taped plastic bag, and finally in burlap tied with twine. Cooke acknowledged in his testimony that the marijuana was extremely well packaged.]

of a luggage compartment and were "closed containers" within the meaning of the plurality opinion, and, as their appearance did not manifest their contents,[4] the warrantless search was unconstitutional under the bright line rule. Sharpe and Savage, moreover, had a reasonable expectation of privacy in the bales, as evidenced by the careful packaging and sealing of the bales and the placing of them inside the curtained camper.]

[Cooke therefore should have obtained a warrant prior to searching the bales. Because he did not do so, the marijuana should have been suppressed on this ground, as well as on the ground that the initial seizure of the bales was unlawful.[5]]

[[4] Sharpe and Savage produced ample evidence of the virtual identity in appearance of the marijuana bales and bales of tobacco, cotton goods, and hemp.]

[[5] Another ground upon which Sharpe and Savage challenge the admission of the marijuana into evidence was the prejudicial effect of the destruction of the marijuana. Because we conclude that the marijuana should have been suppressed, we do not find it necessary to decide this question. The procedure that the government followed in destroying the evidence—without defense counsel's knowledge and without leave from the district court—nevertheless seriously concerns us, as it did the district court, and compels comment.]

[We note that the claim of prejudice in this instance is colorable. Sharpe and Savage argue that Cooke could not have smelled the tightly packaged marijuana through the closed and well-sealed camper door. They further submit that, had forty-one of the forty-three bales not been destroyed, it would have been possible to reconstruct the conditions of the stop and then to show by scientific proof the difficulty or impossibility of smelling the marijuana under those circumstances. By this means, they could have attacked Cooke's credibility

V.

Having concluded that the marijuana should have been suppressed [either]* because its discovery was the fruit of an illegal detention, [or because the warrantless search of the bales was unlawful,] we reverse Sharpe's and Savage's convictions.

REVERSED.

DONALD RUSSELL, Circuit Judge dissenting:

The defendants/appellants were plainly guilty. Unable to bribe their way out after being caught, they now ask this Court for protection and the majority would give such protection on the theory that the validity of a *Terry*-type stop is to be determined by the stop-watch and not by the totality of the circumstances of the stop. I cannot agree and accordingly dissent. My reasons for such disagreement are:

I.

The Fourth Amendment preserves "[t]he right of the people to be secure . . . against unreasonable

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and the existence of probable cause to search the truck. The destruction, of course, made the simulation impossible.]

[The better procedure would have been for the government to have petitioned the district court for an order allowing the destruction, and for the defendants to have received notice of the impending destruction and to have had access to the seized evidence prior to the destruction. Such a procedure ensures that defendants are not prejudiced by the government's handling of evidence. *See United States* v. *Heiden*, 508 F.2d 898 (9th Cir. 1974) (concurring opinion).]

*The words enclosed in brackets were "delet[ed]" from the opinion by the court of appeals when it reconsidered the case upon remand from this Court. See App. A, *supra*, 2a.

searches and seizures . . . ." The amendment does not prohibit all searches and seizures, only *unreasonable* searches and seizures. *Elkins* v. *United States*, 364 U.S. 206, 222, 80 S.Ct. 1437, 1446, 4 L.Ed. 2d 1669 (1960). In *Terry* v. *Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 1877, 20 L.Ed.2d 889 (1968), the Supreme Court defined "seizure"; "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." As a general rule "the police must, whenever practicable, obtain judicial approval of searches and seizures through the warrant procedure . . . .", *id.* at 20, 88 S.Ct. at 1879 (citation omitted), "[b]ut we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subject to the warrant procedure." *Id.*

In determining the reasonableness of the actions of the police, the *Terry* Court set forth a two part test for stopping a citizen: "Whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* For the first part of this test, the officers must be able to point to "specific and articulable facts," *id.* at 21, 88 S.Ct. at 1880, which provide some objective manifestation that the person stopped is . . . engaged in criminal activity." *United tSates* v. *Cortez*, ——U.S. ——, ——, 101 S.Ct. 690, 694, 66 L.Ed.2d 621 (1981). The second part, involving the conduct of the stop itself, depends on the totality of the circumstances: "The manner in which the seizure and search were conducted is, of course, as vital a part of the

inquiry as whether they were warranted at all. . . . We need not develop at length in this case, however, the limitations which the Fourth Amendment places upon a protective seizure and search for weapons. These limitations will have to be developed in the concrete factual circumstances of individual cases." 392 U.S. at 28-29, 88 S.Ct. at 1883-84. *See also id.* at 15, 19, 88 S.Ct. at 1876, 1878. Subsequent to *Terry*, a balancing test has been used by the Court in examining the reasonableness of the search and seizure. *See, e.g., Brown* v. *Texas*, 443 U.S. 47, 50-51, 99 S.Ct. 2637, 2640, 61 L.Ed.2d 357 (1979); *Delaware* v. *Prouse*, 440 U.S. 648, 654, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979); *Dunaway* v. *New York*, 442 U.S. 200, 219, 99 S.Ct. 2248, 2260, 60 L.Ed.2d 824 (1979) (White, J., concurring); *Michigan* v. *Summers*, —— U.S. ——, —— n.12, 101 S.Ct. 2587, 2593 n.12, 69 L.Ed.2d 340 (1981); *Pennsylvania* v. *Mimms*, 434 U.S. 106, 108-09, 98 S.Ct. 330, 332, 54 L.Ed.2d 331 (1977); *Rawlings* v. *Kentucky*, 448 U.S. 98, 110 n.5, 100 S.Ct. 2556, 2564, 65 L.Ed.2d 663 (1980); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878-84, 95 S.Ct. 2574, 2578-52, 45 L.Ed.2d 607 (1975); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 554-56, 96 S.Ct. 3074, 3081-82, 49 L.Ed.2d 1116 (1976).

The Court in these cases has agreed that Agent Cooke and Patrolman Thrasher had sufficient grounds for stopping Sharpe and Savage, but the majority, rather than examine the totality of the circumstances surrounding this stop, holds that an objective criterion of any investigatory stop is that it must be brief, and that the investigatory stop here was not brief. Such objective requirement has never been recognized by the Supreme Court, and I do not agree

that this stop, under the circumstances, was not brief within the concept of a *Terry*-stop.

To be sure, the Court in *Brignoni-Ponce* wrote that the roving border patrol stop lasted " 'no more than a minute' " and required " 'a response to a brief question or two and possible production of a document evidencing a right to be in the United States.' " 422 U.S. at 880, 95 S.Ct. at 2579-80 (quoting Brief for United States at 25). And, in *Martinez-Fuerte*, the Court noted that the stops in the secondary inspection area lasted three to five minutes on the average. 428 U.S. at 547, 96 S.Ct. at 3078. These statements are, however, descriptive, not prescriptive, and are to be considered along with all other circumstances when evaluating the reasonableness of the search and seizure. Rather than creating a rule that the investigatory stop must be brief in some objective and absolute measure, I would hold that the Court should look at—as it must when looking at the grounds for the stop itself—the totality of the circumstances. *See United Sates* v. *Cortez*, —— U.S. at ——, 101 S.Ct. at 694; *United States* v. *Bull*, 565 F.2d 869 (4th Cir. 1977), *cert. denied*, 435 U.S. 946, 98 S.Ct. 1531, 55 L.Ed.2d 545 (1978); *United States* v. *Constantine*, 567 F.2d 266, 267 (4th Cir. 1977) (per curiam), *cert. denied*, 435 U.S. 926, 98 S.Ct. 1492, 55 L.Ed.2d 520 (1978); *United States* v. *Dodier*, 630 F2.d 232, 234-35 (4th Cir. 1980).

Not only do I not agree to the mechanical application of the "brief stop" rule created by the majority, I also believe that the facts of this case demonstrate that the intrusion was minimal and that such delay as there was was occasioned by the defendants themselves. DEA Agent Cooke had been following the Pontiac driven by Sharpe and the truck and camper

driven by Savage for some twenty-one miles when he decided to stop the vehicles on the basis of what the majority conceded to have been "specific and articulable facts" providing some "objective manifestation . . .[of] criminal activity." Before he could do so, the two vehicles, traveling in tandem for the entire distance, turned off the main road and onto a campground road where they drove fifty-five to sixty miles per hour through the thirty-five mile per hour zone, plainly attempting to elude Agent Cooke; after completing the loop, the vehicles turned back onto the main highway. Cooke meanwhile had engaged Patrolman Thrasher to help him pursue the vehicles. As they proceeded in the middle of three south-bound lanes with the Pontiac first, followed by the truck, then Cooke, and finally Thrasher in his patrol car, Cooke asked Thrasher to pull the Pontiac and truck over.[1] Thrasher moved into the left lane and pulled alongside the Pontiac and signaled him over. Then, according to Cooke:

> The Pontiac started over to the right and as he moved into the right-hand lane, Mr. Thrasher started to move over also and the Ford pickup cut between the two vehicles, between the Highway Patrol car and the Pontiac and proceeded on down the road.

Thrasher testified that as Sharpe pulled over, Savage "continued south almost hitting my car." When the Pontiac pulled over and the truck kept going, Cooke

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[1] Cooke was not a uniformed officer, nor was he in a marked car. After stopping Sharpe, however, he placed a flashing blue light on the dash of his car. Thrasher, on the other hand, was a uniformed officer and drove a marked car. This may account for Cooke asking Thrasher to stop the cars.

decided to stay with the Pontiac while Thrasher followed the truck, finally pulling it over a half mile from the Pontiac.

This ploy by Savage in the truck is the basic cause of the delay complained of by the appellants; there is no evidence of any unnecessary delay on the part of the officers. At trial Agent Cooke testified that he asked for identification from Sharpe and Mr. Davis, a passenger in Sharpe's car, and then tried to contact Patrolman Thrasher on the radio. Apparently Thrasher was out of his car because Cooke was unable to contact him for "a few minutes." Ten minutes after Cooke stopped Sharpe, officers from the Myrtle Beach Police Department arrived to remain with Sharpe while Cooke joined Thrasher and Savage.

During the time that Cooke was with Sharpe and Davis, Thrasher had checked Savage's identification and the registration on the truck. Savage produced a Florida driver's license and a bill of sale for the truck dated the day before in the name of Pavlovich. The bill of sale was from Atlanta while the truck had South Carolina plates. Savage said that the truck belonged to a friend, that it was empty, and that he was taking it to get the shocks fixed. When Cooke arrived, Savage again maintained that the truck was empty and that he was taking it on behalf of a friend to fix the shocks. At this point Cooke stepped on the back bumper and the truck did not move. It thus was obvious that the truck was heavily loaded. The officer then smelled marijuana. The truck was opened and the marijuana discovered.

Cooke testified that once he reached Savage the whole process of checking Savage's identification, stepping on the rear bumper of the truck to see if it was heavily loaded, and smelling the marijuana took

one or two minutes. Savage was then arrested and placed in the patrol car with Thrasher,[2] while Cooke returned to the Pontiac where he arrested Sharpe and Davis. (Charges against Davis were later dismissed.) It is significant that the entire process from stop to arrest took at most thirty to forty minutes—most of the time being consumed by Cooke trying to contact Thrasher by radio and Cooke traveling between the two vehicles.[3]

This is not the custodial detention found unsupportable in *Dunaway* v. *New York*, 442 U.S. 200, 99 S.Ct., 2248, 60 L.Ed.2d 824 (1979). In *Dunaway*, the police found the suspect at a neighbor's home and, without probable cause to arrest him, took him to the police

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[2] Savage offered $30,000 to Patrolman Thrasher if he would let him "hit the beach and run."

[3] The thirty to forty minute delay can only be invoked in favor of Sharpe. Cooke spent ten to fifteen minutes with Sharpe and then proceeded to join Thrasher and Savage. Once Cooke reached Savage the questioning took one or two minutes, after which Cooke smelled the marijuana. Thus Savage can complain of a delay of ten to fifteen minutes, at most.

The Model Code of Pre-Arraignment Procedure § 110.2(1) (1975) suggests that an officer may "order a person to remain in the officer's presence near such place for such period as is reasonably necessary for the accomplishment of the purposes authorized in the Subsection, but in no case for more than twenty minutes." Even under this guideline the initial stop of Sharpe was good and the stop and arrest of Savage would be good.

If we really wished to split hairs, we should subtract the time it took Savage to go the dditional half mile, and get out of the truck. This mechanical hair-splitting knows no bounds. *See* Van Graafeiland, 'The Second Circuit Review—1976-77 Term, Foreword—The Constitution and Numbers Game," 44 Brooklyn L.Rev. 747 (1978).

station for questioning. Within an hour, he had made a statement, *Id.* at 203 n.2, 99 S.Ct. at 2251. The Court noted, as one of the factors in its decision to suppress the questioning and its fruits, the fact that he "was not questioned briefly where he was found," but instead "was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room." *Id.* at 212, 99 S.Ct. at 2256. Under the circumstances, it is not difficult to see that the police in *Dunaway* had clearly crossed the rational bounds of a *Terry* stop and had arrested the suspect without probable cause. Indeed, the Supreme Court concluded that "the detention of petitioner was in important respects indistinguishable from a traditional arrest." *Id.*

In contrast, here the officers conducted a *Terry* stop "by the book." They stopped Sharpe and Savage, frisked them, and asked for identification. Agent Cooke walked to the back of the truck, stepped on the bumper, and then said he smelled marijuana. There was no abusive handling of the suspects, no prolonged questioning, and no intrusive probing into the suspect's vehicles. Furthermore, Savage had already indicated that the truck was not his and that it was empty. Thus the initial questioning of Sharpe and Savage only aroused Agent Cooke's suspicion even more—a factor we should consider. See 3 W. LaFave, *Search & Seizure*, § 9.2 at 38, 40.[4]

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[4] I think that it is clear that, *Dunaway* notwithstanding, Patrolman Thrasher might have escorted Savage back to Agent Cooke, Sharpe, and the Pontiac and still been within the proper bounds of a *Terry* stop. *See, e.g., United States* v. *Oates*, 560 F.2d 45 (2d Cir. 1977); *United States* v. *Short*, 570 F.2d 1051 (D.C. Cir. 1978); *United States* v. *Wylie*, 569

This simply does not rise to the level of the unnecessary delay criticized by the Eighth Circuit in *United States* v. *Miller*, 546 F.2d 251 (8th Cir. 1976), or by the Ninth Circuit in *United States* v. *Perez-Esparza*, 609 F.2d 1284 (9th Cir. 1980), both cited by the majority. In *Miller* (the police searched a house pursuant to a warrant. After finding the drugs they were searching for, the police decided to search and frisk those present including the defendant, who was a visitor in the house and had indicated a desire to leave. The search revealed a gun, and the defendant was convicted of receipt of a firearm by a previously convicted felon. The Eighth Circuit, in reversing the conviction, found that if the officers feared for their safety, the search—occurring some ten to fifteen minutes after the search began—should have been conducted when the officers first arrived. In addition, it should be noted that the search of the defendant was not related to the officers' purpose in the house, which was to search for drugs on the premises, *see Ybarra* v. *Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979), nor was the defendant the owner of the house. *See Michigan* v. *Summers*, —— U.S. ——, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981).

In *Perez-Esparza*, the Border Patrol, acting on a tip from a reliable informant that the defendant was smuggling drugs in his car, detained the defendant for two and a half hours until DEA agents could arrive from San Diego. The Court did not, as the majority does in this case, apply any stop-watch rule

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F.2d 62 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 944, 98 S.Ct. 1527, 55 L.Ed.2d 542 (1978). Surely Thrasher's keeping Savage with his vehicle was the least restrictive of permissible alternatives.

in determining the validity of the officers' action; it chose to rest its decision as I suggest we should do here, on the totality of the particular circumstances. The Ninth Circuit found that where the government had failed to justify the extreme delay, under the circumstances in the case, the defendant had been arrested without probable cause. The court specifically noted that "[w]e also do not consider whether when all officers who are competent to question a suspect are several minutes away, it is constitutionally permissible to detain a suspect briefly on less than probable cause." 609 F.2d 1284, 1287 n.2 (citing *United States* v. *O'Looney*, 544 F.2d 385 (9th Cir.), *cert. denied*, 429 U.S. 1023, 97 S.Ct. 642, 50 L.Ed.2d 625 (1976)). The court then examined the difference in motivation behind taking a suspect to the police station for brief questioning because they cannot adequately examine him at the scene as in *O'Looney*,[5] and taking a suspect to the police station for an unnecessarily long interrogation which might just as easily have been conducted at the scene, a neighbor's house. *See Dunaway* v. *New York*, 422 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). The court then continued:

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[5] In *United States* v. *O'Looney*, 544 F.2d 385 (9th Cir.) *cert. denied*, 429 U.S. 1023, 97 S.Ct. 642, 50 L.Ed.2d 625 (1976), O'Looney, suspected of exporting guns to Ireland for use by the Irish Republican Army, was detained at the police station until Alcohol, Tobacco, and Firearms' agents could arrive to talk with him. The court held that "[i]t was not unreasonable to detain O'Looney temporarily at the station to await the arrival of federal officers who are more familiar with federal firearms laws and more experienced in their enforcement." *Id.* at 389.

> We do not think *Dunaway* forecloses using *Terry*-type analysis to solve such problems, when they arise in on-the-scene, unplanned, questioning. The normative distinction between *Dunaway* and *O'Looney* lies in the reasonableness of the police motivations for detaining the respective defendants.
>
> Nevertheless, we need not reach the question whether *O'Looney* rather than *Dunaway*, should govern on the facts of the case before us, because the record does not supply sufficient police justification for the detention. There is nothing in the record to demonstrate why the Border Patrol agents stationed at the San Clemente checkpoint, who may have been experienced in drug smuggling cases, could not adequately have questioned Perez-Esparza immediately after stopping him. The record is silent as to any real justification for two and one-half hour detention pending arrival of the DEA agents from San Diego, and the detention was thus unnecessary, even if not quite so egregious as the police conduct in *Dunaway*. Thus, as in *Dunaway*, the detention for custodial interrogation was impermissible on less than probable cause.

A similar conclusion was reached in *United States* v. *Richards*, 500 F.2d 1025 (9th Cir. 1974), *cert. denied*, 420 U.S. 924, 95 S.Ct. 1118, 43 L.Ed.2d 393 (1975). The court stated that "[t]he test for determining the lawfulness of such police detentions is whether under the totality of the circumstances, they are reasonable," and then found that "[a]lthough appellant's eventual detention for over an hour cannot be considered a 'brief' or 'momentary' stop, in the

particular circumstances of this case we believe that this extended detention was reasonable." *Id.* at 1029. *Cf. United States* v. *Mayes*, 524 F.2d 203 (9th Cir. 1975) (suspect held for an hour and a half while Border Patrol agents checked out his story); *United States* v. *Short*, 570 F.2d 1051, 1054-55 & n.7 (D.C. Cir. 1978) (suspect taken to scene of burglary for identification); *United States* v. *Wylie*, 569 F.2d 62, 70-71 (D.C. Cir. 1977) *cert. denied*, 435 U.S. 944, 98 S.Ct. 1527, 55 L.Ed.2d 542 (1978) (suspect returned to bank for questioning).

These cases provide no support for the *per se* rule offered by the Court today; rather they clearly hold that we are entitled to look at all of the circumstances. Thus while an hour delay was not unreasonable in *O'Looney* or *Richards*, the fifteen minute delay in *Miller* was. Furthermore, *Miller* involved detention without "specific and articulable facts" while *O'Looney* and *Richards* involved *Terry* stops. We should also note that in *Michigan* v. *Summers*, —— U.S. ——, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981), the defendant was detained for almost fifty minutes while the police searched his house, 49 U.S.L.W. 3674 (summary of oral argument), yet the Court passed this over by saying that "[a]lthough special circumstances or a prolonged detention, might lead to a different conclusion in an unusual case, we are persuaded that this routine detention of residents of a house while it was being searched for contraband pursuant to a warrant is not such a case." —— U.S. at —— n. 21, 101 S.Ct. at 2595 n.21. *Cf. Rawlings* v. *Kentucky*, 448 U.S. 98, 107, 100 S.Ct. 2556, 2562, 65 L.Ed.2d 633 (1980) (suspects detained for forty-five minutes while officers obtained a search warrant).

The only delay in this case was not associated with the questioning of Sharpe and Savage, but strictly with the need for Cooke to talk with both drivers. After following them for twenty miles, there could be no question that they were traveling together and, in view of Savage's stunt, there can be little doubt that they did not wish to be stopped together, if at all. Agent Cooke was experienced in dealing with suspected drug traffickers, and so it was not unreasonable for Patrolman Thrasher to hold Savage briefly until Cooke could join them.[6]

I would hold that because of the deliberate actions of Sharpe and Savage to avoid being stopped together, the brief detention of the pair was not unreasonable and therefore not a violation of the Fourth Amendment. There being no Fourth Amendment violation, I would not suppress the evidence discovered from the search and seizure.

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[6] Analogies to *Dunaway* and the problems attendant to custodial interrogation are thus misplaced. In *Dunaway* the Supreme Court found that stops at the border were *Terry* stops in a "special context" because of the "importance of the governmental interest at stake." 442 U.S. at 210-11 n.13, 99 S.Ct. at 2255 n.13. *See United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878-81, 95 S.Ct. at 2578-80 (1975). The governmental interest at stake here is of no less importance. We can take note that while South Carolina does not have serious problems with illegal aliens, it does have a substantial problem with drug smuggling. At trial Agent Cooke testified that in the two years prior to stopping the appellants, he personally had encountered "in excess of two hundred thousand pounds" of marijuana. At least three justices have also taken note of the seriousness of the trafficking in controlled substances. *United States* v. *Mendenhall*, 446 U.S. 544, 561-62, 100 S.Ct. 1870, 1881, 64 L.Ed.F2d 497 (1980) (Powell, J., concurring).

II.

The majority also holds that the "bright line" rule of *Robbins* v. *California*, —— U.S. ——, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981) (Plurality opinion), applies to forty-three burlap-wrapped bales each weighing about sixty pounds and containing a total of 2,629 pounds of marijuana. I cannot join the Court in such a finding, nor do I read support for such a ruling in *Robbins* or *Arkansas* v. *Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979).

The Fourth Amendment protects persons from "unreasonable searches and seizures" which invade the security of "their persons, houses, papers and effects." The Supreme Court has in turn declared that a search of a person or his property, as defined in the Amendment, without a warrant issued in conformity with the requirements of the Amendment's warrant clause is normally unreasonable and invalid *per se*. However, the Court has recognized, as an exception to the warrant requirement, that a search warrant is not necessary where there is probable cause to search an automobile stopped on a highway. *Carroll* v. *United States*, 257 U.S. at 132, 153-54, 45 S.Ct. 280, 285, 69 L.Ed. 543 (1925).

A number of reasons have been given for this exception. While this exception has been justified on the "inherent mobility" of the automobile, which makes the procurement of a warrant impracticable, the exception's basis "lies in the diminished expectation of privacy which surrounds the automobile." *United States* v. *Chadwick*, 433 U.S. 1, 12, 97 S.Ct. 2476, 2484, 53 L.Ed.2d 538 (1977). "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal ef-

fects." *Cardwell* v. *Lewis*, 417 U.S. 583, 590, 94 S.Ct. 2464, 2469, 41 L.Ed.2d 325 (1974) (plurality opinion).

Subsequent cases have followed this justification in reaching their conclusions. Thus the validity of searches of articles found in an automobile stopped on the highway has been governed by the presence or absence of a legitimate expectation of privacy in the article searched. Where there is such reasonable expectation of privacy, the Supreme Court has held that luggage which has been seized in connection with the stopping of an automobile may not be searched without a warrant. *Arkansas* v. *Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979). The reason for such conclusion is that "luggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy." *Id.* at 762, 99 S.Ct. at 2592 (relying on *Chadwick*, 433 U.S. at 13, 97 S.Ct. at 2484).

In amplifying on this reason the Court said that

> a suitcase taken from an automobile stopped on the highway is not necessarily attended by any lesser expectation of privacy than is associated with luggage taken from other locations. One is not less inclined to place private, personal possessions in a suitcase merely because the suitcase is to be carried in an automobile rather than transported by other means or temporarily checked or stored. Indeed, the very purpose of a suitcase is to serve as a repository for personal items when one wishes to transport them. Accordingly, the reasons for not requiring a warrant for the search of an automobile do not apply to searches of personal luggage taken by police

> from automobiles. We therefore find no justification for the extension of *Carroll* and its progeny to the warrantless search of one's personal luggage merely because it was located in an automobile lawfully stopped by the police.

Id. at 764-65, 99 S.Ct. at 2593-94. The Court, however, was at pains to caution that "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. . . There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not." *Id.* at 764 n.13, 99 S.Ct. at 2593-94 n.13.

During the last term of Court the issue involved in *Sanders* was re-examined in two cases. In the first case the search was invalidated, *Robbins* v. *California*, —— U.S. ——, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981) (plurality opinion); in the other, decided the same day, it was sustained. *New York* v. *Belton*, —— U.S. ——, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). Somewhat confusingly, a majority of the Supreme Court appears to have felt that the two cases should have been decided the same way, and six members of the Court were of the opinion that *Belton* was correctly decided. *See id.* at ——, 101 S.Ct. at 2865 (Stevens, J., concurring).

The majority, of course, relies on the plurality opinion in *Robbins* for support of its conclusion. However, *Robbins* is a tenuous precedent on which to plant a decision. The opinion itself was a plurality opinion, concurred in by only four members of the Court.[1] Three members of the Court vigorously dis-

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[1] *See generally*, Note, "Plurality Decisions and Judicial Decisionmaking," 94 Harv. L. Rev. 1127 (1981).

sented. Two concurred only in the judgment. Concurring in the judgment, Justice Powell remarked on the fact that views expressed in the dissent came from the Court "late in the Term" and expressed the hope that, "[s]ome future case affording an opportunity for more thorough consideration of the basic principles at risk may offer some better, if more radical, solution to the confusion that infects this benighted area of the law." —— U.S. at ——, 101 S.Ct. at 2851.[8] Perhaps this may be such a case.

In *Robbins* the Court held that a small (about the size of a cigar box), closed, opaque container discovered when the officers "opened the tailgate of the stationwagon, located a handle set flush in the deck, and lifted it up to uncover a recessed luggage compartment," *id.* at ——, 101 S.Ct. at 2844, could not be opened without a warrant. The Court, creating a "bright line" rule, decided that a warrant will ordinarily be required before a container found in the trunk of a car may be searched. It noted two exceptions to this: No warrant is required for (1) a container which, by its very nature, reveals its contents, or (2) a container, the contents of which are exposed to "plain view." *Id.* at ——, 101 S.Ct. at 2846 (relying on *Sanders*, 442 U.S. at 764 n.13, 99 S.Ct. at 2593-94). Justice Stewart noted that the first was merely a variation of the second, "since, if the distinctive configuration of a container proclaims its contents, the contents cannot fairly be said to have been removed from a searching officer's view. The same would be true, of course, if the container were

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[8] *See* Hutchison, "Felix Frankfurter and the Business of the Supreme Court, O.T. 1946, O.T. 1961," 1980 S.Ct. Rev. 143, 185-89 (1981).

transparent, or otherwise clearly revealed its contents." *Id.* at ————, 101 S.Ct. at 2846.

Neither *Sanders* nor *Robbins* supports the rule announced by the majority, that "all closed containers manifest an individual's reasonable expectation of privacy in their contents, unless a container *by its very appearance betrays an illegal purpose* or its contents are exposed to plain view." [slip op. at 972 (emphasis added)]. What the Supreme Court stated, contrary to the majority's view, was that it would be easy to identify that "some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy *because their contents can be inferred from their outward appearance*," and that

> not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment . . . . There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile.

442 U.S. at 764 n.13, 99 S.Ct. at 2593-94 n.13 (emphasis added).

If *Sanders* can be construed as holding that a container is protected only if it is "inevitably associated with the expectation of privacy," 442 U.S. at 762, 99

S.Ct. at 2592.[9] *Robbins* indicates that containers are protected unless they are inevitably not associated with an expectation of privacy. These are but alternate statements of what in effect is the same principle. Under either *Sanders* or *Robbins* Savage cannot reasonably claim to have a Fourth Amendment privacy interest in the bales of marijuana. If, as the majority notes, the bales could just as easily have contained "tobacco, cotton goods, and hemp" then it is clear that the forty-three bales—by both their nature and their number—betrayed that they did not contain personal items, but must have contained some agricultural commodity. I do not believe that even if Agent Cooke had smelled marijuana that the bales would have been protected under a privacy theory. If, as the majority assures us these bales could have contained one of several agricultural products, I do not think that, before the public could search them, they would have to eliminate every possible commodity except marijuana—no more than they would have to know whether a gun case contained a Remington, a Winchester, or a sawed-off, home-made shotgun. Nor is it of any account to argue that the bales *might* have contained personal items, since someone might just as easily place socks, underwear, and a toothbrush in a gun case or in a burglar's kit.

Thus the marijuana in this case was, I submit, in "plain view" or "otherwise clearly revealed." One controlling fact here is that the odor of the marijuana —over 2,600 pounds—was distinctive and clearly observable. That was sufficient to place the contents of

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[9] *See United States* v. *Goshorn*, 628 F.2d 697, 700-01 (1st Cir. 1980); *United States* v. *Mannino*, 635 F.2d 110, 114 (2d Cir. 1980).

the bales in "plain view." We held in *United States* v. *Haynie*, 637 F.2d 227, 233 (4th Cir. 1980), that "probable cause may be supported by the detection of distinctive odors as well as sight." In *United States* v. *Sifuentes*, 504 F.2d 845, 848 (4th Cir. 1974), we found that "[w]hen the police opened the door of the van, they saw the boxes and smelled a strong odor of marijuana. These facts combined to place the contraband in plain view, that is, obvious to the senses." It should be clear that the odor of marijuana provides sufficient grounds for probable cause. *See* Annotation, "Odor of Narcotics as Providing Probable Cause for Warrantless Search," 5 ALR 4th 681, 687-97 (1981) (collecting cases).

For these reasons I do not regard *Robbins* as analogous to this case. It is true that both cases are similar in that there was probable cause to search the interior of the stationwagon in *Robbins* and the truck in this case, but in this case, the bales of marijuana—forty-three of them weighing some sixty pounds each—were all stacked up in the truck, open to plain view and disclosing their character by their distinctive odor. The Court in *Robbins* was dealing with two packages brick-like in size, inside a closed opaque container, and stored in a closed luggage compartment. Moreover, there was no contention that the two bricks, stored in a container located in a recessed luggage compartment, were distinguished by odor; in this case, the evidence was ample that there was such odor. And this difference is understandable. There were at most some twenty or thirty pounds of marijuana in *Robbins*; there were one hundred times that in this case. I submit these factual differences would be sufficient to justify different results in the two cases.

The plurality opinion in *Robbins* did dismiss the argument that the expectation in privacy of personal effects, which is the basis for the immunity from search, is to be limited to "containers commonly used to transport 'personal effects.'" —— U.S. at ——, 101 S.Ct. at 2845. It reasoned, though, that different people used different containers to carry their "effects" such as "a closed suitcase, briefcase, portfolio, duffle bag, or box." It will be noted, though, that all the illustrations used by the plurality to support this statement relate to containers normally used to carry personal "effects" or "papers." Justice Powell in his concurring opinion draws quite a distinction between containers "such as personal baggage, . . . inevitably associated with the expectation of privacy," and others which "consistently lack such an association." —— U.S. at —— n.3, 101 S.Ct. at 2850 n.3. In dissent, Justice Blackmun perceived the same difficulty in determining what articles, under the plurality's test, could or could not be validly searched without a warrant, as had Justice Powell. He suggested that "only time will tell whether the 'test,' . . . for determining whether a package's exterior 'announce[s] its contents' will lead to a new stream of litigation." *Id.* at ——, 101 S.Ct. at 2851 (citation omitted).

Arkansas v. *Sanders* would confine the rule relied on by the majority to articles which are "inevitably associated with an expectation of privacy." That at least is the way Justice Powell, the author of the opinion in *Sanders*, indicated in his concurring opinion in *Robbins* the opinion in *Sanders* should be construed. Assuredly there was no expectation of privacy in the bulky bales in this case, whether they be regarded as bales of marijuana, or of cotton, or of cloth. Those simply are not articles in which one has some reasonable expectation of privacy. In *Robbins*, Justice

Stewart said that "[e]xpectations of privacy are established by social norms, and to fall within the second exception of the footnote in question [footnote 13 in *Sanders*], a container must so clearly announce its contents, whether by its distinctive configuration, its transparency, or otherwise, that its contents are obvious to an observer." —— U.S. ——, 101 S.Ct. at 2847. Applying this to the facts in *Robbins*, he emphasized that there was no proof "that marijuana is ordinarily 'packaged this way.' " The situation here, however, is quite different from that in *Robbins*. While marijuana may not ordinarily be packaged as in *Robbins*, the transportation of marijuana in bales such as was the case here is ordinary, particularly when large quantities of marijuana are involved. "If "social norms" provide the test for determining whether articles found in an automobile enjoy an "expectation of privacy" as "repositories of personal effects," it is plain, I submit, that 2,629 pounds of marijuana, the odor of which is easily detectable, stored in a truck in forty-three bales of sixty pounds each, can hardly be considered by reasonable "social norms" to be the "repositories of personal effects." There was, in this case, no reasonable "expectation of privacy" in the marijuana and the District Court correctly so ruled.

We may add that there can be no question that Cooke had a right to open the back of the truck. Cooke smelled the marijuana from outside the truck; that gave him probable cause to search the camper. The mobility of the truck gave him the right to search it on the spot. *Chambers* v. *Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); *Carroll* v. *United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed.2d 543 (1925). The response adopted by Agent Cooke

and Patrolman Thrasher was surely reasonable. Given that the odor of marijuana gave them probable cause to search the truck, they did not have to simply shrug their shoulders and allow Savage and Sharpe to escape, *Adams* v. *Williams*, 407 U.S. 143, 145, 92 S.Ct. 1921, 1922, 32 L.Ed.2d 612 (1972), while they went off in pursuit of a warrant. And to have detained Savage and Sharpe until a warrant was secured would only have compounded the "error" (of delay) of which the majority complains.

The fact that the bales were not opened until two or three days after they were seized is not constitutionally significant. The bales did not lose the property of "plain smell—plain view" by being transported to Charleston. The odor from the bales was just as obvious in Charleston as it was along the side of the highway. The Supreme Court stated in *Chambers* v. *Maroney*, 399 U.S. at 52, 90 S.Ct. at 1981: "For constitutional purposes, we see no differences between, on the one hand, seizing and holding a car before presenting the probable cause issue to a magistrate and, on the other hand, carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." This view from *Chambers* has been followed in other cases involving automobiles, *Cardwell* v. *Lewis*, 417 U.S. 583, 595-96, 94 S.Ct. 2464, 2471-72, 41 L.Ed.2d 325 (1974) (plurality opinion); *Colorado* v. *Bannister*, —— U.S. ——, ——, 101 S.Ct. 42, 43, 66 L.Ed.2d 1 (1980); *Cooper* v. *California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967);[10] *Texas* v. *White*, 423 U.S. 67, 68, 96

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[10] *Cooper* is an interesting case in point. The police impounded the defendant's car at the same time that they arrested him but did not search the car until a week later. Evi-

S.Ct. 304, 305, 46 L.Ed.2d 209 (1976) (per curiam), and in at least one case involving the defendant's personal effects. In *United States* v. *Edwards*, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974), the Court held that no search warrant was required to take the suspect's clothing from him ten hours after he had been arrested:

> Surely, the clothes could have been brushed down and vacuumed while Edwards had them on in the cell, and it was similarly reasonable to take

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dence seized during the search was introduced against him. Later cases have tried to distinguish *Cooper* on the grounds that a California statute authorized seizure of the car pending forfeiture proceedings, *e.g.*, *Coolidge* v. *New Hampshire*, 403 U.S. 443, 457 n.12, 91 S.Ct. 2022, 2033 n.12, 29 L.Ed.2d 564 (1971); *see* Note, "Warrantless Searches and Seizures of Automobiles," 87 Harv. L. Rev. 835, 846-47 (1974), but the language of *Cooper* indicates that the Court did not rely exclusively on that ground:

> But the question here is not whether the search was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment. Just as a search authorized by state law may be an unreasonable one under that amendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one. While it is true, as the lower court said that 'lawful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it,' [234 Cal. App. 2d 587, 598, 44 Cal. Rptr. 483, 491], the reason for and nature of the custody may constitutionally justify the search.

386 U.S. at 61, 87 S.Ct. at 790-91.

The Court then distinguished *Cooper* from *Preston* v. *United States*, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964), because the police in *Preston* searched Preston's car after he had been picked up for vagrancy; the search was not incident to the arrest.

> and examine them as the police did, particularly in view of the existence of probable cause linking the clothes to the crime. Indeed it is difficult to perceive what is unreasonable about the police's examining and holding as evidence those personal effects of the accused that they already have in their lawful custody as the result of a lawful arrest.

415 U.S. at 806, 94 S.Ct. at 1238. The Court concluded by quoting *United States* v. *DeLeo*, 422 F.2d 487, 493 (1st Cir.), *cert. denied*, 397 U.S. 1037, 90 S.Ct. 1355, 25 L.Ed.2d 648 (1970) (footnote omitted): " 'While the legal arrest of a person should not destroy the privacy of his premises, it does—for at least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence,' " 415 U.S. at 808-09, 94 S.Ct. at 1239-40. *See Abel* v. *United States*, 362 U.S. 217, 239, 80 S.Ct. 683, 697, 4 L.Ed.2d 668 (1960).

I am not suggesting that the search of the bales in Charleston is justified under the automobile exception. The *Carroll* exception is applicable to this case only in that the mobility of the truck and the odor of the marijuana combined to give Agent Cooke probable cause and the exigent circumstances necessary to search for the marijuana he smelled without first securing a warrant. Agent Cooke had a right to open the back of the truck which then exposed the bales. I am suggesting that seeing the bales and smelling the odor of marijuana placed the marijuana in plain view and made obtaining a warrant to search the bales superfluous.[11] "It is no answer to say that the police

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[11] Allowing the police to search a car without a warrant at the scene but requiring them to obtain a warrant before searching it at the station would ultimately encourage police

could have obtained a warrant, for '[t]he relevant test is not whether it is reasonable to produce a search warrant, but whether the search was reasonable.'" *Cooper* v. *California*, 386 U.S. 58, 62, 87 S.Ct. 788, 791, 17 L.Ed.2d 730 (1967) (quoting *United States* v. *Rabinowitz*, 339 U.S. 56, 66, 70 S.Ct. 430, 435, 94 L.Ed.2d 653 (1950). Having smelled the marijuana, having seen the forty-three bales, and then arresting Savage for possession of marijuana with intent to distribute and Sharpe for conspiracy to possess marijuana with intent to distribute, it would have been a gratuitous formality for Cooke to have requested a warrant.[12]

After *Arkansas* v. *Sanders* the courts may have been confused over which containers were protected and which were not, *see United States* v. *Ross*, 655 F.2d 1159, at 1173-1174 n.3 (D.C. Cir. 1981) (en banc) Tamm, J., dissenting), but even after *Robbins* no court need be so confused as to hold that a person has an expectation of privacy in bales of marijuana weighing 2,629 pounds. The "bright line" established by *Robbins* does not apply to this case. Surely we can tell the difference between a suitcase or a green garbage bag and forty-three, sixty-pound burlap bales.

I would sustain the validity of the stop and the search and affirm the judgments of conviction.

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to search the vehicle before making the arrest. Note, "Warrantless Searches and Seizures of Automobiles," 87 Harv. L. Rev. 835, 844 (1974).

[12] Since a warrant was secured before the Pontiac was searched, it is obvious that Cooke was not ignorant of the procedure and was not derelict in performing his duty. Although the good faith belief of an officer will not excuse him from getting a warrant, in this case it points to the fact that Cooke believed the marijuana was in plain view. He knew exactly what he had; the only remaining inquiry was a test of the quality of the marijuana.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 79-5314

UNITED STATES OF AMERICA, APPELLEE

vs.

WILLIAM HARRIS SHARPE, APPELLANT

Appeal from the United States District Court for the District of South Carolina

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JUDGMENT

Pursuant to remand of the Supreme Court of the United States, this cause came on to be heard on the record from the United States District Court for the District of South Carolina, and argument previously submitted by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the majority opinion filed September 4, 1981, is readopted as modified by the opinion of this Court filed herewith; the previous decision is reaffirmed and the convictions reversed.

[Filed Jun. 30, 1983]

/s/ William K. Slate II
Clerk

[SEAL]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5315

UNITED STATES OF AMERICA, APPELLEE

vs.

DONALD DAVIS SAVAGE, APPELLANT

Appeal from the United States District Court
for the District of South Carolina

JUDGMENT

Pursuant to remand of the Supreme Court of the United States, this cause came on to be heard on the record from the United States District Court for the District of South Carolina, and argument previously submitted by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the majority opinion filed September 4, 1981, is readopted as modified by the opinion of this Court filed herewith; the previous decision is reaffirmed and the convictions reversed.

[Filed Jun. 30, 1983]

/s/ William K. Slate II
Clerk

[SEAL]

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